CLERK'S CO
179
402909
Sup. Ct

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 74

LEWIS K. STONER, PETITIONER,

vs.

NEW YORK LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

Blank Page

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 74

LEWIS K. STONER, PETITIONER,

vs.

NEW YORK LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	a	1
Caption (omitted in printing)	a	
Record from D. C. U. S., Western District of Missouri	1	1
Petition for declaratory judgment	1	1
Answer	9	8
Demurrer and motion of defendant to dismiss	16	15
Opinion and order overruling demurrer and motion of defendant to dismiss	17	17
Transcript of evidence	19	18
Approval of transcript of evidence by counsel	19	18
Caption	19	18
Stipulation that case be tried without jury and that evidence or documents contained in former printed record may be introduced in present case, etc	20	19
Testimony for plaintiff	20	19
Plaintiff's exhibits	21	20
1—Policy of Insurance No. 9961088 of New York Life Insurance Company issued to Lewis K. Stoner	21	20
2—Policy of Insurance No. 9961037 of New York Life Insurance Company issued to Lewis K. Stoner	24	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1940.

—424

	Original	Print
Record from D. C. U. S., Western District of Missouri—Continued		
Transcript of evidence—Continued		
Testimony for plaintiff—Continued		
Plaintiff's exhibits—Continued		
3—Policy of Insurance No. 10928484 of New York Life Insurance Company issued to Lewis K. Stoner	25	23
4—Policy of Insurance of New York Life Insurance Company issued to Lewis K. Stoner	25	24
Lewis K. Stoner	26	24
Lawrence C. Stoner	54	54
Dr. J. A. Gray	57	57
Dr. F. Gregg Thompson, Jr.	66	65
Dr. Charles T. Settles	70	69
Motion of defendant to refuse declaratory judgment	73	72
Testimony for defendant	75	73
Lewis K. Stoner	75	74
Letter, Frank S. Lantry to Lewis K. Stoner, October 26, 1933	83	81
Letter, Frank S. Lantry to Lewis K. Stoner.	83	82
Dr. H. J. Ryan	85	83
Plaintiff's request for conclusions of law	94	92
Plaintiff's request for special findings of fact	95	92
Motion of plaintiff for new trial	96	94
Record entry of overruling of motion for new trial	97	95
Opinion, findings, conclusions and declaratory judgment.	98	95
Declaratory judgment	102	100
Notice of appeal	103	100
Stipulation as to contents of transcript	103	101
Clerk's certificate to transcript	104	101
Recital of mailing of copy of notice of appeal to Counsel	105	102
Statement of points relied on	105	102
Appearances of counsel	(omitted in printing)	108
Order of submission	109	105
Opinion, Dewey, J.	110	105
Dissenting opinion, Thomas, J.	119	113
Concurring opinion, Van Valkenburgh, J.	126	120
Judgment	130	124
Petition of appellee for rehearing	131	125
Order denying petition for rehearing	133	127
Clerk's certificate	134	127
Order allowing certiorari	135	128

[fol. a] [Caption omitted]

[fol. 1] **IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI**

PETITION FOR DECLARATORY JUDGMENT—Filed Jan. 8, 1938

Comes now the plaintiff, New York Life Insurance Company, a corporation, and for cause of action herein states the following facts, to-wit:

I

That the plaintiff, New York Life Insurance Company, is now and was at all times hereinafter mentioned a corporation duly organized and existing under the laws of the State of New York, with authority to sue and be sued by its corporate name, and duly licensed to engage in the general insurance business in the State of Missouri; that it is and was at all times hereinafter mentioned a duly domiciled citizen and resident of the State of New York and was and still is a non-resident of the State of Missouri; that the defendant, Lewis K. Stoner, is and was at all times hereinafter mentioned a duly domiciled resident citizen of Atchison County, Missouri, within the St. Joseph Division of the District Court of the United States for the Western District of Missouri.

II

That the controversy here involved is of a civil nature and the matter and amount in dispute in said cause exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

III

That an actual controversy exists between plaintiff and the defendant as to the status of each of four policies or contracts of life insurance heretofore issued by plaintiff to defendant, the person whose life is insured in each of said policies; that the controversy between plaintiff and defendant is as to whether or not the defendant is totally disabled [fol. 2] within the terms and meaning of said policies and entitled to the monthly disability benefits and the waiver of the premiums as therein provided, the plaintiff contending that the defendant is not so disabled and not entitled to

these benefits, while the defendant claims and asserts that he is so disabled and entitled to said benefits of the policies.

IV

That the facts and circumstances from which said controversy arose are as follows, to-wit:

1. That Mary M. Stoner is the mother of the defendant, Lewis K. Stoner; that Margaret Stoner is the wife of the defendant, Lewis K. Stoner.

2. That on the 18th day of August, 1927, the plaintiff, New York Life Insurance Company, executed and delivered to the defendant, Lewis K. Stoner, its policy No. 9961037 by which the plaintiff agreed, in consideration of the payment of Twenty-nine Dollars and fifty-eight cents ($29.58) at the time of delivery, and the like sum as annual premium payable on the second day of August each year thereafter, (a) to pay to the beneficiary, Mary M. Stoner, One Thousand Dollars ($1,000.00) upon receipt of due proof of the death of the defendant, Lewis K. Stoner, and in case such death resulted from accident, to pay the sum of Two Thousand Dollars ($2,000.00), and (b) upon receipt of due proof that the insured has become and is totally and presumably permanently disabled, as defined in said policy, to pay to the insured the sum of Ten Dollars ($10.00) each month and to waive payment of the premiums falling due during the period of continuous total disability. That by way of definition it was agreed that disability should be considered total whenever the insured becomes so disabled by bodily injury or disease that he is wholly prevented from performing any work, following any occupation, or from engaging in any business for remuneration or profit; that said policy further provides that if the insured becomes totally disabled as defined above, and the proof submitted is not conclusive as to permanence of such disability but establishes that the insured is and for a period of not less than three consecutive months, immediately preceding receipt of proof [fol. 3] of loss, has been totally disabled, income payments will be made and premiums waived. That said policy further provides that the plaintiff may demand due proof of the continuance of total disability before making any income payment or waiving any premium; that upon failure to furnish such proof, or if the insured performs any work,

or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived.

3. That on the 18th day of August, 1927, the plaintiff, New York Life Insurance Company, executed and delivered to the defendant, Lewis K. Stoner, its policy No. 9961038 by which the plaintiff agreed, in consideration of the payment of Forty-four Dollars and thirty-seven cents ($44.37) at the time of delivery and the like sum as annual premium payable on the second day of August each year thereafter, (a) to pay to the beneficiary, Mary M. Stoner, Fifteen Hundred Dollars ($1500.00) upon receipt of due proof of the death of the defendant, Lewis K. Stoner, and in case such death resulted from accident, to pay the sum of Three Thousand Dollars ($3,000.00), and (b) upon receipt of due proof that the insured has become and is totally and presumably permanently disabled, as defined in said policy, to pay to the insured the sum of Fifteen Dollars ($15.00) each month and to waive payment of the premiums falling due during the period of continuous total disability. That by way of [definitation] it was agreed that disability should be considered total whenever the insured becomes so disabled by bodily injury or disease that he is wholly prevented from performing any work, following any occupation, or from engaging in any business for remuneration or profit; that said policy further provides that if the insured becomes totally disabled as defined above, and the proof submitted is not conclusive as to permanence of such disability but establishes that the insured is and for a period of not less than three consecutive months, immediately preceding receipt of proof of loss, has been totally disabled, income payments will be made and premiums waived. That said policy further provides that the plaintiff may demand due proof of the continuance of total disability before making any income payment or waiving any premium; that upon failure to fur- [fol. 4] nish such proof, or if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived.

4. That on the 7th day of January, 1930, the plaintiff, New York Life Insurance Company, executed and delivered to the defendant, Lewis K. Stoner, its policy No.

10928483 by which the plaintiff agreed, in consideration of the payment of One Hundred Sixty Dollars and seventy cents ($160.70) at the time of delivery and the like sum as annual premium payable on the seventh day of January of each year thereafter, (a) to pay to the beneficiaries, Margaret Stoner and Mary M. Stoner, share and share alike, Five Thousand Dollars ($5,000.00) upon receipt of due proof of the death of the defendant, Lewis K. Stoner, and in case such death resulted from accident, to pay the sum of Ten Thousand Dollars ($10,000.00), and (b) upon receipt of due proof that the insured has become and is totally and presumably permanently disabled, as defined in said policy, to pay to the insured the sum of Fifty Dollars ($50.00) each month and to waive payment of the premiums falling due during the period of continuous total disability. That by way of definition it was agreed that disability should be considered total whenever the insured becomes so disabled by bodily injury or disease that he is wholly prevented from performing any work, following any occupation, or from engaging in any business for remuneration or profit; that said policy further provides that if the insured becomes totally disabled as defined above, and the proof submitted is not conclusive as to permanence of such disability but establishes that the insured is and for a period of not less than three consecutive months, immediately preceding receipt of proof of loss, has been totally disabled, income payments will be made and premiums waived. That said policy further provides that the plaintiff may demand due proof of the continuance of total disability before making any income payment or waiving any premium; that upon failure to furnish such proof, or if the insured performs any work, or follows any occupation or engages in any business for remuneration or profit, no further income payment shall be made nor premiums waived.

[fol. 5] 5. That on the 7th day of January, 1930, the plaintiff, New York Life Insurance Company, executed and delivered to the defendant, Lewis K. Stoner, its policy No. 10928484 by which the plaintiff agreed in consideration of the payment of One Hundred Sixty Dollars and seventy cents ($160.70) at the time of delivery and the like sum as annual premium payable on the seventh day of January of each year thereafter, (a) to pay to the beneficiaries,

Margaret Stoner and Mary M. Stoner, share and share alike, Five Thousand Dollars ($5,000.00) upon receipt of due proof of the death of the defendant, Lewis K. Stoner, and in case such death resulted from accident, to pay the sum of Ten Thousand Dollars ($10,000.00), and (b) upon receipt of due proof that the insured has become and is totally and presumably permanently disabled, as defined in the said policy, to pay to the insured the sum of Fifty Dollars ($50.00) each month and to waive payment of the premiums falling due during the period of continuous total disability. That by way of definition, it was agreed that disability should be considered total whenever the insured becomes so disabled by bodily injury or disease that he is wholly prevented from performing any work, following any occupation, or from engaging in any business for remuneration or profit; that said policy further provides that if the insured becomes totally disabled as defined above, and the proof submitted is not conclusive as to permanence of such disability but establishes that the insured is and was for a period of not less than three consecutive months, immediately preceding receipt of proof of loss, has been totally disabled, income payments will be made and premiums waived. That said policy further provides that the plaintiff may demand due proof of the continuance of total disability before making any income payment or waiving any premium; that upon failure to furnish such proof, or if the insured performs any work, or follows any occupation or engages in any business for remuneration or profit, no further income payment shall be made nor premiums waived.

6. That the provisions of said four (4) policies hereinabove mentioned with reference to total and permanent disability and total and permanent disability benefits are identical except as to amount of the monthly income bene-
[fol. 6] fits provided for and the amount of the premiums which plaintiff agreed to waive; that the provisions of the four (4) policies mentioned above are identical with reference to death benefits except as to amount provided for in each, and except as to the beneficiaries thereof.

7. That the insured, Lewis K. Stoner, paid the premiums required by said four (4) policies mentioned above, falling due prior to the 29th day of June, 1931. That the plaintiff waived payment of all premiums falling due be-

tween June 29, 1931 and up to and including September 29, 1933. That the premiums falling due after September 29, 1933, upon each of the four policies have not been waived.

8. That on the 29th day of June, 1931, the defendant, Lewis K. Stoner, sustained an injury to his left ankle through accidental means and was immediately thereafter rendered totally disabled. Upon receipt of proof of the injury and disability, after its continuance for three (3) consecutive months immediately preceding receipt of proof, the plaintiff commenced making disability payments upon each of the aforementioned policies of insurance in the total sum of One Hundred Twenty-five Dollars ($125.00) per month, and further, pursuant to the provisions of said policies as aforesaid, began waiving the payment of annual premiums falling due upon said policies mentioned above. That upon the claim of the defendant, Lewis K. Stoner, for total and permanent disability benefits the plaintiff continued to make monthly payments in the sum of One Hundred Twenty-five Dollars ($125.00) per month and to waive payment of all premiums falling due up to and including the 29th day of September, 1933.

9. That prior to September 29, 1933, the defendant, Lewis K. Stoner, so recovered from his injury that he was no longer totally disabled, and from that time has not been totally disabled; that prior to September 29, 1933, the plaintiff learned that the defendant, Lewis K. Stoner, was no longer totally disabled, and notified the defendant, Lewis K. Stoner, to make due proof of the continuance of his alleged total disability, and offered to receive and consider proof of the same; that the defendant, Lewis K. Stoner, failed to submit proof of the continuance of his alleged total disability, and plaintiff notified him that no further income [fol. 7] payments would be made or premiums waived; that from some time prior to September 29, 1933, up to and including the time of the filing of this bill, the defendant has been engaged in a recognized work, business and occupation for profit and from which he obtains a livelihood; that by reason of the foregoing, the defendant is not now and has not been since September 29, 1933, entitled to any income payments or the waiver of any premiums under and by virtue of the terms and provisions of the four policies of insurance mentioned above herein.

10. That following plaintiff's refusal to make any income payment or to waive any premium after September 29, 1933, the defendant, Lewis K. Stoner, instituted in the State Court an action for the recovery of disability income benefits claimed by him to be due for the period intervening between September 29, 1933, and March 29, 1934; that said petition contains four counts, each of which is based upon one of the policies hereinabove mentioned, and each of which alleges that since June 29, 1931, Lewis K. Stoner has been and is totally and permanently disabled; that said suit is still pending and no final judgment has been entered therein.

11. That thereafter, the defendant, Lewis K. Stoner, instituted two additional actions based on identical allegations of disability and involving the identical issues which are involved in the suit instituted in 1934, one of said actions being in two counts based on policies No. 9961038 and 10928484 respectively, and seeking the permanent disability benefits provided therein for the period intervening between April 29, 1934 and May 29, 1936. The other action simultaneously instituted is in two counts, seeking to recover the disability benefits provided in policies No. 9961037 and 10928483 for the period intervening between April 29, 1934, and May 29, 1936; that said suits are still pending and no final judgment has been entered therein.

That plaintiff's liability to defendant for permanent disability benefits and waiver of premiums under the provisions of said policies for the period intervening between May 29, 1936 and the date of the institution of this action, to-wit, January 8, 1938, will not and cannot be determined by any judgment that may be entered in any of the suits pending in the State Courts.

[fol. 8] 12. That defendant is insisting that there is now due him under the terms and provisions of said contracts of insurance for disability benefits for the period intervening between May 29, 1936, and January 7, 1938, the sum of Twenty-three Hundred Seventy-five Dollars ($2375.00), and that he is entitled to have the premiums falling due on said policies during said period in the amount of Seven Hundred Ninety Dollars and seventy cents ($790.70) waived, and said amount so paid for premiums refunded to him, making a total amount of Thirty-one Hundred Sixty-five Dollars and seventy cents ($3165.70), for which defendant is mak-

ing demand of payment upon plaintiff; and which plaintiff denies that defendant is entitled to under the provisions of said policies of insurance.

V

That under the facts and circumstances aforesaid, an actual controversy now exists between plaintiff and defendant as to the status of each of said four policies of insurance, as to the existence or non-existence of permanent, total disability upon the part of the defendant, Lewis K. Stoner, within the definition and meaning of said policies, and as to the rights and the legal relations of the parties thereto; that the plaintiff is, under the statutes in such cases made and provided, entitled to the rendition by this court of a declaratory judgment defining the status of said policies of life insurance and defining and declaring the rights and obligations of the parties thereto.

Wherefore, plaintiff prays the rendition by this court of a declaratory judgment declaring and defining the status of said policies of insurance numbered 9961038, 10928484, 9961037, and 10928483, and each of them, heretofore issued by plaintiff to defendant, Lewis K. Stoner, and declaring that under the terms thereof the defendant is not entitled to have the premiums thereon waived from and after May 29, 1936, and is not entitled to any total and permanent disability benefits payable thereunder during the period intervening between May 29, 1936 and January 7, 1938, and that plaintiff may have its costs herein expended and incurred.

Boyle G. Clark, Paul M. Peterson, William H. Becker,
H. Templeton Brown, Attorneys for Plaintiff.

[fol. 9] *Duly sworn to by Paul M. Peterson. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 19, 1938

1. Comes now defendant in the above-entitled cause and for his answer to plaintiff's petition admits that the plaintiff New York Life Insurance Company now is and was at

all times mentioned in the petition a corporation duly organized and existing under the laws of the State of New York, with authority to sue and be sued by its corporate name, and duly licensed to engage in the general insurance business in the State of Missouri; that it is and was at all times mentioned in the petition a duly licensed citizen and resident of the State of New York, and was and still is a non-resident of the State of Missouri; that the defendant Lewis K. Stoner is and was at all times mentioned in the petition a duly domiciled resident and citizen of the State of Atchison County, Missouri, within the St. Joseph Division of the District Court of the United States for the Western District of Missouri.

2. This defendant denies that the matter and amount in dispute in this cause, exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3000.00).

[fol. 10] 3. This defendant denies there is an actual controversy existing between plaintiff and defendant as to the status of each or any of the four policies or contracts of life insurance mentioned in the petition, issued by plaintiff to defendant whose life is insured in each of said policies. This defendant admits there is a controversy between plaintiff and defendant as to whether or not the defendant is totally disabled within the meaning and terms of said policies, the plaintiff contending the defendant is not so disabled while defendant claims and asserts that he is so disabled and is entitled to the benefits of said policies hereinafter set out.

4. This defendant admits that Mary F. Stoner is the mother and that Margaret Stoner is the wife of defendant Lewis K. Stoner.

5. This defendant admits that on the 18th day of August, 1927, the plaintiff executed and delivered to defendant Lewis K. Stoner its policy No. 9961037, by which the plaintiff agreed, in consideration of the payment of $29.58 at the time of delivery, and a like amount as annual premium payable on the 2nd day of August of each year thereafter to (a) pay to the beneficiary Margaret Stoner $1000 upon receipt of due proof of the death of defendant, Lewis K. Stoner, and in case such death resulted from accident, to pay the sum of $2000; and (b) upon receipt of due proof that the insured had become and was totally and presumably per-

manently disabled, to pay to the insured the sum of $10 each month and to waive payment of premiums falling due during the period of continuous total disability.

6. This defendant admits that on the 18th day of August, 1927, the plaintiff executed and delivered to the defendant Lewis K. Stoner its Policy 9961038 by which the plaintiff agreed, in consideration of the payment of $44.37 at the time of delivery and the like sum as annual premium payable on the 2nd day of August of each year thereafter to (a) pay to the beneficiary Mary M. Stoner $1,500 upon receipt of due proof of the death of defendant Lewis K. Stoner and in case such death resulted from accident, to pay the sum of $3000; and (b) upon receipt of due proof that the insured has become and is totally and presumably permanently disabled, to pay the insured the sum of $15 each month and to [fol. 11] waive payment of premiums falling due during the period of continuous total disability.

7. This defendant admits that on the 7th day of January, 1930, the plaintiff executed and delivered to defendant Lewis K. Stoner its Policy 10928483, by which the plaintiff agreed, in consideration of the payment of $160.70 at the time of delivery and the like amount as annual premium payable on the 7th day of January of each year thereafter to (a) pay to the beneficiary Mary M. Stoner and Margaret Stoner, share and share alike, $5000 upon receipt of due proof of the death of defendant Lewis K. Stoner, and in case such death resulted from accident, to pay the sum of $10,000; and (b) upon receipt of due proof that the insured had become and is totally and presumably permanently disabled, to pay the insured the sum of $50 each month, and to waive payment of the premiums falling due during the period of total continuous disability.

8. This defendant admits that on the 7th day of January, 1930, the plaintiff executed and delivered to defendant Lewis K. Stoner its Policy 10928484, by which the plaintiff agreed, in consideration of the payment of $160.70 at the time of delivery and the like amount as annual premium payable on the 7th day of January of each year thereafter, to (a) pay to the beneficiary Mary M. Stoner and Margaret Stoner, share and share alike $5000 upon receipt of due proof of the death of defendant Lewis K. Stoner, and in case such death resulted from accident, to pay the sum of

$10,000; and (b) upon receipt of due proof that the insured had become and is totally and presumably permanently disabled, to pay the insured the sum of $50 each month, and to waive payment of the premiums falling due during the period of total continuous disability.

This defendant admits that each of said four policies contained a provision that disability should be considered total whenever the insured becomes so disabled by bodily injury or disease that he is totally prevented from performing any work, following any occupation, or from engaging in any business for remuneration or profit, and that if the insured becomes totally disabled as provided by said policy, and the proof submitted is not conclusive as to the permanency of such disability but establishes the insured, and for a [fol. 12] period of not less than three consecutive months immediately preceding receipt of proof of loss, has been totally disabled, income payments will be omitted and premiums waived. This defendant admits that said policies further provide that the plaintiff may demand due proof of the continuance of total disability before making any income payment or waiving any premium; that upon failure to furnish such proof, or if the insured performs any work or follows any occupation or engages in any business for remuneration or profit, no further income payments shall be made or premiums waived. But defendant alleges that each of said policies insured defendant against disability to perform the duties of a farmer in cultivating and managing a farm or farms rented or owned by him; and that it was also provided in each of said policies that defendant was totally disabled if, by reason of an accidental injury, he was unable to do all substantial and material acts necessary to the prosecution of his business or occupation as a whole, in the customary and usual manner, and that total disability did not mean a state of absolute helplessness. And this defendant avers that by reason of said accidental injury he was rendered unable to perform the substantial duties of his occupation or to follow his occupation or to follow any other occupation.

9. This defendant states the facts to be that each of said four policies were applied for by the defendant and were executed and delivered to him in the State of Missouri, and that all of the premiums called for in each of said policies were payable and were paid by him to the plaintiff in the

State of Missouri, and that all of the disability benefits were payable, and so far as they have been paid, were paid to the defendant in the State of Missouri, and that the amounts agreed to be paid in each of said policies upon the death of defendant are payable in the State of Missouri, and that all of the provisions of said policies were to be performed in said state.

10. This defendant admits that he paid all the premiums required by said four policies of insurance falling due prior to June 29, 1931, and that he has paid all of said premiums falling due up to the time of the institution of this suit, although the plaintiff waived payment of all premiums falling due after June 29, 1931.

[fol. 13] 11. This defendant admits that on June 29, 1931, he sustained an injury to his left ankle through accidental means and was immediately thereafter rendered totally disabled; that upon receipt of proof of the injury and disability, after its continuance for three consecutive months immediately preceding receipt of proof, the plaintiff commenced making disability payments upon each of the aforementioned policies of insurance in the total sum of $125 per month and further, pursuant to the provisions of said policies aforesaid, began waiving the payment of annual premiums falling due upon said policies above mentioned, that upon the claim of the defendant Lewis K. Stoner for total and presumably permanent disability benefits the plaintiff continued to make monthly payments in the sum of $125 per month up to September 29, 1933.

12. The defendant denies that prior to September 29, 1933, he so recovered from his injuries that he was no longer totally disabled, and denies that from that time on to the date of the institution of this suit he has not been totally disabled; and denies that prior to September 29, 1933, plaintiff learned that defendant was no longer totally disabled; and denies that plaintiff notified Lewis K. Stoner to make proof of his alleged total disability and offered to receive and consider proof of the same; and denies that defendant failed to submit proof of the continuance of his alleged total disability, but admits that on the 29th day of September, 1933, the plaintiff notified defendant that no further income payments would be made or premiums waived, and this defendant denies that from some time prior to September 29,

1933, up to and including the time of the filing of this bill, or at any time after defendant was injured as hereinabove stated, he has been engaged in a recognized work, business or occupation for profit from which he obtains his livelihood, and denies that the defendant is not now and has not been since September 29, 1933, entitled to any income payments or the waiver of any premiums under and by virtue of the terms and provisions of four policies of insurance mentioned above.

13. Defendant admits that following plaintiff's refusal to make any income payments after September 29, 1933, the [fol. 14] defendant instituted in the state court, to-wit: In the Circuit Court of Buchanan County, Missouri, an action for the recovery of disability income benefits claimed by him to be due for the period intervening between September 29, 1933, and March 29, 1934; that said petition contains four counts, each of which is based upon one of the policies hereinabove mentioned, and each of which petitions states that since June 29, 1933, Lewis K. Stoner has been and is totally and presumably permanently disabled and that said suit is still pending and no final judgment has been entered therein.

14. Defendant admits that thereafter he instituted two additional actions based upon identical allegations of disability and involving the identical issues which are involved in the suit instituted in 1934, one of said actions being in two counts based on Policies 9961038 and 10928484 respectively, and seeking to recover the disability benefits provided for therein for the period intervening between April 29, 1934 and May 29, 1936. Defendant admits that in the other action above referred to the petition is in two counts, seeking to recover disability benefits provided in Policies 9961037 and 10928483 for the period intervening between April 29, 1934 and May 29, 1936, and that said suits are still pending and no final judgment has been entered therein. And this defendant avers that both of said suits were instituted in 1934 and are still pending, one in the Circuit Court of Buchanan County, Missouri, and one in the Circuit Court of Daviess County, Missouri.

15. Defendant denies that plaintiff's liability to defend for permanent disability benefits and the right to the waiver of premiums, if he insisted on such waivers under the pro-

visions of said policies, for the period intervening between May 29, 1936, and the date of the institution of this action, to-wit: January 8, 1938, will not and cannot be determined by any judgment that may be entered in any of the suits pending in said state courts. And this defendant avers that the question whether defendant recovered from his said disability on or prior to September 29, 1933, and the liability of the plaintiff to the defendant for said disability benefits and the waiver of said premiums (if insisted upon by defendant) covering the period last above mentioned, can be [fol. 15] determined by the judgment rendered in any one of said suits now pending in said state court; and that said state courts having taken jurisdiction of said suits to determine said matters prior to the time this suit was instituted, and having jurisdiction to determine the same, this court in its discretion should decline to enter any declaratory judgment in this cause.

16. Defendant admits there is now due him under the terms and provisions of said contract of insurance for disability benefits for the period intervening between May 29, 1936, and January 7, 1938, the sum of $2375, but this defendant denies that he is claiming or ever claimed to the plaintiff that he was entitled to have the premiums falling due on said policies in the sum of $790.70 waived. This defendant admits that he has paid said premiums during said period, but denies that he has ever claimed to the plaintiff that he is entitled to a refund of said premiums so paid or any part thereof; and denies that he ever demanded the repayment of said sum or any part thereof; and denies he is demanding the same now; and denies that any controversy exists or ever existed between the plaintiff and defendant with respect to the right of the defendant to have said sum of $790.70 or any part thereof so paid on account of said premiums refunded to him.

17. This defendant denies that any controversy exists between plaintiff and defendant as to the status of any of said four policies, but admits there is a controversy between plaintiff and defendant as to whether defendant is totally disabled and whether said disability is presumably permanent within the meaning of said policies. And defendant avers that there is not and never has been any other controversy between plaintiff and defendant. This defendant avers that the plaintiff has always admitted and

still admits that it is liable for the unpaid installments claimed by defendant if he is totally and presumably permanently disabled within the meaning of said policies and defendant has always admitted and still admits plaintiff owes him nothing on account of said disability benefits if he is not so disabled. This defendant denies that the plaintiff is entitled to the rendition by this court of a declaratory judgment or that this court has jurisdiction of [fol. 16] this cause, or that in its discretion the court should render a declaratory judgment in the circumstances shown and admitted in this case as hereinabove stated; and defendant denies each and every allegation of plaintiff's petition not herein specifically admitted to be true.

Having fully answered, this defendant prays that any judgment prayed for by plaintiff be denied, and that he be dismissed hence with his costs.

Culver, Phillip, Kaufmann and Smith, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEMURRER AND MOTION OF DEFENDANT TO DISMISS—Filed February 3, 1938

Comes now the defendant in the above-entitled cause and demurs to and moves the court to dismiss the plaintiff's petition for the following reasons, to-wit:

1. Because the petition fails to state facts sufficient to constitute a cause of action;

2. Because the petition fails to state facts sufficient to entitle the plaintiff to the judgment prayed for, or any judgment;

3. Because the petition does not state facts sufficient to give this court jurisdiction over said cause;

4. Because the petition shows that the amount in controversy is less than Three Thousand Dollars, and that in consequence this court has no jurisdiction over this cause;

5. Because on the facts stated in the petition the court has no jurisdiction or power to render a declaratory judg-

ment declaring or defining the status of any of the policies mentioned in the petition or declaring that under the terms thereof the defendant is not entitled to have the premiums thereon waived from and after May 29, 1936, or declaring that the defendant is not entitled to any disability benefits during the period intervening between May 29, 1936 and January 7, 1938;

6. Because the petition shows upon its face that Mary M. Stoner is the beneficiary in Policies 9961037 and 9961038, [fol. 17] and that said Mary M. Stoner is a necessary party to this suit and there is a defect in parties defendant in that the said Mary M. Stoner has not been made a party to this suit.

7. Because the petition shows upon its face that Margaret Stoner and Mary M. Stoner are the beneficiaries in Policies 10928483 and 10928484, and that the said Margaret Stoner and Mary M. Stoner are necessary parties to this suit, and there is a defect in parties defendant in that said Margaret Stoner and Mary M. Stoner have not been made parties to this suit;

8. Because said petition is multifarious in that the plaintiff seeks a declaratory judgment as to the status of Policies 9961037 and 9961038, in which Margaret Stoner is in no wise interested, and also seeks a declaratory judgment as to the status of Policies 10928483 and 10928484, in which the said Margaret Stoner is interested;

9. Because said petition is multifarious in that the plaintiff seeks a declaratory judgment as to the status of Policies 10928483 and 10928484, 9961037 and 9961038, which are separate, independent contracts, in no way connected with each other, and which in no way can create any right in favor of the defendant or any of the beneficiaries named therein, which is dependent upon any of the remaining policies, and because said policies do not create any joint right in favor of either party to this suit or any of the beneficiaries named in said policy;

10. Because upon the facts stated in said petition the court in the exercise of reasonable discretion may not render any declaratory judgment.

Culver, Phillip, Kaufmann and Smith, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Opinion and Order Overruling Demurrer and Motion of Defendant to Dismiss—Filed April 30, 1938

The points made against the petition which I discuss here (other points have been considered) are (1) that the amount [fol. 18] involved is not such as to give this court jurisdiction, and (2) that in view of the pendency of certain suits in the state court in which the same matters are involved, the court should exercise its discretion to dismiss the petition here.

(1) Whether more than $3000 is involved in the controversy must be decided upon the face of the petition. The demurrer (or motion to dismiss) admits the facts therein pleaded. It is pleaded in the petition as follows:

"That defendant is insisting that there is now due him under the terms and provisions of said contracts of insurance for disability benefits for the period intervening between May 29, 1936, and January 7, 1938, the sum of Twenty-three Hundred Seventy-five Dollars ($2375.00), and that he is entitled to have the premiums falling due on said policies during said period in the amount of Seven Hundred Ninety Dollars and Seventy Cents ($790.70) waived, and said amount so paid for premiums refunded to him, making a total amount of Thirty-one Hundred Sixty-five Dollars and Seventy Cents ($3165.70), for which defendant is making demand of payment upon plaintiff, and which plaintiff denies that defendant is entitled to under the provisions of said policies of insurance."

If the second of the two sums mentioned in the excerpt from the petition ($790.00) is demanded of the plaintiff by the defendant, then more than $3000 is involved in the controversy. The demurrer admits that the demand is being made. Upon the argument it was urged that the demand is without justification and should, therefore, be ignored in calculating the amount involved. It does not, however, appear from the face of the petition that this demand, which the defendant is making (and scarcely is in a position to contend is a frivolous demand) is without any foundation whatsoever. It is not obligatory upon plaintiff in a petition for declaratory judgment to plead facts showing that

a demand made of the plaintiff is justifiable in all of its elements in order to establish the existence of a controversy over an amount of which the federal court has jurisdiction.

(2) I do not believe the court should exercise its discretion (if it has any discretion) to refuse to entertain a peti-
[fol. 19] tion otherwise sufficient on the ground that in a court of another jurisdiction a case is pending involving the same issues. No injunctive relief is asked here, and none would be granted if asked, against the prosecution in the state court of the cases there pending. If in the normal course this case is reached for trial before those cases are reached for trial, then there would seem to be no good reason why this case should not be tried. If those cases should be reached for trial before this case, the judgments in them would undoubtedly be res adjudicata of the issues here and probably would dispose of this case.

The demurrer (or motion to dismiss) is overruled. It Is So Ordered. An exception is allowed to the defendant.

Merrill E. Otis, District Judge.

[File endorsement omitted.]

Transcript of Evidence

In United States District Court for the Western District of Missouri, St. Joseph Division

No. 2296

New York Life Insurance Company, a Corporation, Plaintiff

vs.

Lewis K. Stoner, Defendant

Approval of Transcript of Evidence by Counsel

It is hereby stipulated and agreed by and between the parties hereto that the following transcript contains all the evidence submitted in this case essential to the decision of the questions presented by the appeal, and the same is submitted to the Clerk of this Court and designated by both

parties as the testimony to be included in the record on appeal in accordance with the provisions of Rule 75 (f) of the Rules of Civil Procedure.

Boyle G. Clark, Paul M. Peterson, Attorneys for Plaintiff. R. E. Culver, Ben Phillip, Attorneys for Defendant.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

TRANSCRIPT OF EVIDENCE—Filed Feb. 3, 1939

Agreed Transcript of Proceedings at the trial of the above-entitled cause held September 26th, 1938, before Honorable Merrill E. Otis, Judge of the United States District Court for the Western District of Missouri, at St. Joseph.

APPEARANCES:

For the Plaintiff: Mr. Boyle G. Clark and Mr. Templeton Brown.

For the Defendant: Culver, Phillip, Kaufmann & Smith, By Mr. Ben Phillip and Mr. Basil Kaufmann.

Plaintiff, to maintain the issues on its behalf, offered and introduced the following testimony:

"Mr. Clark: If the Court please I offer in evidence the stipulation in this case which governs the testimony that may be introduced; provides for the use of the abstract of the record on former appeal. (Said stipulation is in words and figures as follows:)

STIPULATION

"It Is Stipulated And Agreed by and between the parties: 1. That a trial be had before the Court without a jury under the rule of civil procedure for the District Courts of the United States, effective September 1, 1938.

"2. That either party may introduce in evidence any of the evidence or documents contained in the printed transcript of the record in the case of Lewis K. Stoner, Appellant, versus New York Life Insurance Company, a corpo-

ration, Respondent, appealed from the Buchanan County Circuit Court to the Kansas City Court of Appeals, or the case of Lewis K. Stoner versus New York Life Insurance [fol. 21] Company, appealed from the Davies County Circuit Court to the Kansas City Court of Appeals, involving claim for recovery on policies involved in this proceeding with the same force and effect as if the original documents were offered in evidence, or the testimony of the witnesses given from the witness stand, but provided that if the evidence is offered from one record that evidence of the same nature which would be repetition, will not be offered from the other record.

"3. Either party may offer any person as a witness whose testimony is preserved in either of said records to testify in person, and if offered such witness may testify to any fact within the issues presented by the pleadings, and either party may introduce any additional written or record evidence that may be within the issues.

"4. Either party may introduce any additional witnesses that he or it may see fit to use."

Plaintiff offered in evidence plaintiff's Exhibits 1, 2, 3, and 4, the same being copies of the policies of insurance involved in this law suit, the material portions of said exhibits being in words and figures as follows:

PLAINTIFF'S EXHIBIT 1

Note: New York Life Insurance Company policy endorsed on the back No. 9 961 038.

New York Life Insurance Company, a mutual company, agrees to pay to Mary M. Stoner, mother of the insured, beneficiary, $1500.00 upon receipt of due proof of the death of Lewis K. Stoner, the insured, or $3000 if such death resulted from accident as defined under "Double Indemnity" on the second page hereof, and subject to the provisions therein set forth. Either such sum will be increased by any outstanding dividend additions and dividend deposits as provided herein. And upon receipt of due proof that the insured is totally and presumably permanently disabled before age sixty, as defined under "Total and Permanent

Disability" on the second page hereof, the Company agrees to pay to the insured $15 each month and to waive payment of premiums, as provided therein. This contract is made in consideration of the payment in advance of the sum of $34.37, the receipt of which is hereby acknowledged, con-
[fol. 22] stituting the first premium and maintaining this policy for the period terminating on the second day of August, 1928, and of a like sum on said date and every twelve calendar months thereafter during the life of the insured. The premium paying period may be shortened by application of dividend additions and dividend deposits as provided herein. This policy takes effect as of the 2nd day of August, 1927, which day is the anniversary of the policy. The benefits and provisions printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the New York Life Insurance Company has caused this contract to be signed this 18th day of August, 1927.

(Signed) Darwin P. Kingsley, Thomas A. Brickner, President. Seymour M. Ballard, Frederick M. Johnson, Secretary. —— ——, Registrar."

925-51.
O. L.
D.—D. 1.
Age 32.
Examined Sal.
A. B.

Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium Paying Period. Disability Benefits. Double Indemnity for Fatal Accident. Annual Participation in Surplus.

On the second page of said exhibit there appears:

"Total and Permanent Disability"

Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remunera-
[fol. 23] tion or profit, provided such disability occurred after the insurance under this policy took effect and before

the anniversary of the policy on which the insured's age at nearest birthday is sixty. Upon receipt at the Company's home office, before default in payment of premium, of due proof that the insured is totally disabled as above defined, and will be continuously so totally disabled for life, or if the proof submitted is not conslusive as to the permanency of such disability, but establishes that the insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted:

(a) Waiver of Premium.—The Company will waive the payment of any premium falling due during the period of continuous total disability, the premium waived to be the annual, semi-annual or quarterly premium according to the mode of payment in effect when disability occurred.

(b) Income Payments.—The Company will pay to the insured the monthly income stated on the first page hereof ($10 per $1000 of the face of this policy) for each completed month from the commencement of and during the period of continuous total disability. If disability results from insanity, payment will be made to the beneficiary in lieu of the insured. In event of default in payment of premium after the insured has become totally disabled as above defined, the policy will be restored and benefits shall be the same as if said default had not occurred, provided due proof that the insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the Company not later than six months after said default.

The total and irrecoverable loss of the sight of both eyes or of the use of both hands or of both feet or of one hand and one foot, shall constitute total disability for life.

Before making any income payment or waiving any premium the Company may demand due proof of the continuance of total disability, but such proof will not be required [fol. 24] oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, or if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived."

Attached to said policy is the following:

"Application to the New York Life Insurance Company

Part 1

9-961-037
9-961-038

I, Lewis K. Stoner,

Residence: Watson, Atchison County, Missouri.

Present occupation: Farmer.

State exact duties in full: Owns and operates grain and stock farm.

Other occupations, if any: None.

Apply to the New York Life Insurance Company for insurance as follows: Sum to be insured—$1000.00.

What is your occupation? (Full duties.) Farming.

How long have you been engaged in your present occupation? All my life.

What was your previous occupation? None.

Have you ever changed your occupation or place of residence on account of your health? (If so, give full details.) No.

Do you intend to change your occupation or make a journey outside of continental United States or Canada? (If so, give full details.) No."

PLAINTIFF'S EXHIBIT 2

Plaintiff's Exhibit 2, New York Life Insurance policy endorsed on back, #9961037, is identical to Exhibit 1 as to date, form of policy and attached application for insurance, the only exception being that the policy is for $1500.00 instead of $1,000.00.

[fol. 25] PLAINTIFF'S EXHIBIT 3

Exhibit 3, New York Life Insurance Policy, endorsed on back, #10928484, is identical with Exhibits 1 and 2, excepting the beneficiaries are Mary M. and Margaret Stoner, mother and wife of the insured, share and share alike, and the face of the policy is for $5,000.00, and the date is January 7, 1930. The application attached to Exhibit 3 is identical to the applications attached to Exhibits 1 and 2, excepting in lieu of the words "State exact duties in full: owns-

and operates grain and stock farm", which appear in the application attached to Exhibits 1 and 2, the following words appear in Exhibit 3: "State exact duties in full: Owner and manager general farm".

PLAINTIFF'S EXHIBIT 4

Exhibit 4 is identical in all respects to Exhibit 3, and the application attached to Exhibit 4 is identical to the application attached to Exhibit 3.

It was agreed by counsel in open court that the amount of disability benefits involved in this case up to the date of the filing of the suit is $2,375.00; and that the amount of the premiums which defendant paid on the four policies from May 29, 1936, to January 7, 1938, is $790.70. All applications were taken by plaintiff's agent at Rock Port, Missouri, and dated at that place, all policies delivered and premiums paid in Missouri.

Plaintiff thereupon offered in evidence that portion of the abstract of the record in the case of "Lewis K. Stoner, respondent, vs. New York Life Insurance Company, appellant, #19083, tried May 25, 1937, in the Daviess County Circuit Court, as used in the Kansas City Court of Appeals at the October Term, 1937, as contained on pages 59 to 218 of the record, and being the testimony of all the witnesses at the trial in Daviess County, together with the exhibits therein referred to, except the life insurance policies introduced at the trial of said cause.

It was agreed that in reading the transcripts the rulings of the State Courts on objections appearing in the transcripts should be disregarded, and the District Court would make its own rulings.

[fol. 26] The testimony so offered is as follows, to-wit:

Testimony of Lewis K. Stoner:

My name is Lewis K. Stoner, age 42. On and prior to June 29, 1931, my occupation was that of a farmer. I have had no other business. I have had a country grammar school education. I have never been to high school or college, nor have I had any experience or training in any other

business, profession, occupation or avocation, and know nothing of any other business or profession outside that of farming, and I am not equipped to do any work except in the occupation of a farmer. I have been a farmer all my life. (Record 60) The policies were sold to me by Mr. Hanly, an agent for the New York Life Insurance Company. He was acquainted with me and knew I was a farmer and he was acquainted with my farm and how I operated it. At the time I took out these policies I did actual, physical farm work and managed my farms. (67) Mr. Hanly knew the farm I now live on, which is called "the estate farm", which contains about 200 acres which belongs to my mother during her lifetime; and I rented it from my mother, who is still living, under an arrangement by which I was to pay the taxes and pay her some rent. It was not a specified sum. (68) I own an adjacent farm containing 105 acres, referred to as the "105 acre farm", and at all times I occupied and operated those two farms and cultivated them as if they were one farm. But at the time I took out these policies, I did not manage, operate or engage in the management or operation of any farms except these two farms rented and owned by myself, nor did I ever do so either before or since that time. I have never engaged in that business for any one else. (69) At the time I took out out these policies and Mr. Hanly sold them to me, he knew I was working on that farm, he had seen me on the farm working and laboring there. (69)

On June 29, 1931, I had an accident and in consequence thereof sustained an injury. I was going after a load of corn in a wagon I was driving, and an automobile, coming up from behind, struck my wagon, threw the wagon-box off the running gear, and threw me out. I lighted on my left foot in such a way that these two bones here were jerked out of the ankle joint above the shoe, and my foot turned [fol. 27] or flopped and these two bones were pushed into the plowed ground. My team ran away. I was taken to St. Joseph's Hospital and treated by Dr. Caryl Potter, now dead, and my family physician, Dr. J. A. Gray. (70) I remained at the hospital two months and then I was taken home, where I was in bed for probably three months, on my back. At the end of that time I was able to get around some in a wheel-chair for probably a month. Then I was able to be on two crutches for about two months, and then on one crutch and a cane for a time—how long, I don't

know. Finally I got so I could get around with the aid of a cane and that's how I have been getting along since. (71) During the intervening six years, the condition of my leg and ankle has not changed, at least, not for the better. I can walk with, but not without a cane. It helps balance me. My ankle is stiff and swollen and I cannot move it at all. It is just one solid bone, no joint. I cannot move my toes. During the day I can probably walk a block or two and if I do, my leg hurts me. I cannot take a single step on this foot without suffering pain every step I take. I have suffered that pain for almost six years. I can take a step without a cane by moving around stationary but I cannot walk without a cane. (72) The injured foot is always much colder than the other, and the injured ankle is three-quarters of an inch larger than the other. They were the same before I was injured. (73) Before I was injured I was an able-bodied man, weighed about 210 pounds, height 5 foot, 8 or 9. Since my accident I cannot walk on a level floor like this without pain even with a cane.

Q. Can you walk on uneven surface like the soil of a plowed field, anything of that kind, can you walk on that at all?

A. No, scarcely at all. (73)

I walk very slowly, I cannot walk like an ordinary man does. I just get along very slowly. I can go upstairs by stepping on each step with both feet, and then up, I mean by putting my right foot up and then pulling the left to that step. I cannot get either up or down in any other way. My left foot drags quit- a little and is pointed out more to the left, not straight ahead. I walk with a very decided limp. (74) Prior to the time I was injured, June 29, 1931, I worked on "The Estate" farm which I rent and my own [fol. 28] farm of 105 acres. In season I help to prepare the ground. (74) I took a team out as any man did and plowed and disked, cut stalks and raked stalks and burned stalks. I had a hired man that did that too. I worked every day. When I got up in the mornings I always went to the barn and did our chores, milking, getting our teams ready and went to the field and plowed until noon. I plowed, cut stalks, planted corn, mowed hay, put up hay, gathered corn or cut grain, anything there was to do in season on the farm, I did that work, and my hired hand helped me. Except for dinner we worked all day. There was nothing that pre-

vented me from doing that physical work. I bought stock and fed it. On the two farms I had probably 250 or 275 acres in crops and the rest in pasture, and we planted corn, alfalfa, oats and wheat (76), my man and I, all day long until the job was done. After the crops were planted and sowed I cultivated them and worked all day. I used cultivators, plows, harrows and in using a harrow I walked over the plowed ground. (77) The kind of cultivator I have is operated with both legs, they have pedal guides and when you want to go one way you push that pedal with your foot and when you want to go the other you push the other one. You have to have two legs to operate them and I did operate them. When the crops were ready to gather I gathered the corn. I fed the cattle. I scooped corn into the crib or into the feed puncheons for the cattle. I fed most but sold some. When I fed stock I had to scoop the grain in and out of the wagon and had to get in and out of it and then break it up in the trough. To do that work you have to be able to get around in a feed lot. I sold my stock and to do so I had to separate it or cull it out. (79) I drove them to market. Before I was injured I had mowing machines, binders and a corn planter, and operated them. Since I was injured I have not been able to do any of that work. I hire a man to take my place to do the work I did because I am not able to get around. (80) I am not able to plow, operate a binder, a mower, a harrow or feed stock or do any of those things.

Q. Since you were injured you may state what, if any, physical work you can do with respect to the work that is customarily done by a farmer?

A. None. (81)

[fol. 29] Prior to the time I was injured I directed Amphor (my hired man) as to the work to be done on the farm and went out and helped him with the work. I showed him the way I wanted it done and then inspected it to see whether it was done the way I wanted it. I am still able to direct the man as to what I want done. There has never been anything the matter with me mentally. Before I was injured I was able to tell my employes what to do and did so and showed them and helped do the job.

Q. Now since you were injured, have you been able to tell them what to do?

A. Yes sir.

Q. What is the difference between your directing before and since you were injured?

A. Well I say a lot.

Q. Just tell the jury what it is?

A. Well I don't know just how. I believe a fellow can show a fellow and help him do a job better than he can tell him how to do it. Does that answer your question?

Q. I understand you to say before you were injured you would tell him what to do and show him what to do and help him do it, and since that time you can do what?

A. Tell him what to do and then he does it his way; gets it done.

Q. Can you go with him in directing the work to do, to see that he does it?

A. No sir.

Q. Since you were injured are you able to get out in the field?

A. No only in my car is all.

Q. Can you drive a car?

A. Yes.

Q. How do you get in a car and out?

A. Oh, I just kind of like getting up the steps when I go upstairs, just about the same thing I guess. Just step up and fall in and fall out I guess.

Q. How far can you drive a car now without pain?

A. I don't know, quite some distance.

Q. Drive it a hundred miles?

A. Oh, yes, I guess I could.

Q. When you do that, do you suffer any pain?

A. Yes, sir, it bothers me. (83)

(Narrative) When I walk it isn't pain that you can't stand. It is just a pain and bothers you, foot swells and hurts and it is hard for me to sleep and rest. It keeps me awake, how much depends on how much walking I do. I can see what is going on in the fields and the condition of the [fol. 30] crops more or less from the road as I drive along. Without going into the field I cannot see hardly anything. Before I was injured I concluded the kind of crops to be put in.

Q. Can you do that since? Are you able to do that?

A. Well there is nothing the matter with my head. That is all right. Of course I do not know the nature of the

ground like you would if you were out there on it and all that. (84)

I did my banking before I was injured and since then. I go to the bank in the car.

Q. You get out at the bank to make your deposits, to do your business in the bank or what occurs when you get to the bank?

A. I don't always. Done lots of times in front of the bank. I transact what I am going to do right from the car part of the time. (84)

Q. I mean does the banker come out to the car and transact——

A. Yes, sir.

Q. (Continuing) business with you to keep you from getting out of the car?

A. Yes sir, many times.

Before I was injured I bought cattle and hogs, when I went to buy cattle, say to Omaha, we would go up there ordinarily in the morning, probably tromp the whole yards locating the cattle, and then when the market opened if we saw the cattle we would be interested in, we would be there, after we looked around. It was not so much that way with the hogs. Since my injury when I want a lot of cattle I just place an order with the commission man and he gets them bought for me. But I have not inspected any cattle that I bought since that time because on account of my injury I can't get around in the yards and sort the cattle. Most of the time the yards are muddy and slick. (85)

I can't feed hogs since my injury because when walking out in the feed lot, I can't walk out through the cobs and places like that. It is quite an effort for me to walk just on a level floor like this, and I don't believe I could keep out of the way of the animals. When you feed live stock, you use both hands and have to walk at the same time, and I [fol. 31] can't walk and use both hands. I have to support myself with one hand with a cane. (86) I feed 40 to 50 head of cattle, and a few more hogs, on the farm and feed grain and feed that is raised on the farm, sometimes buying corn and feed. I buy live stock in Omaha through Lush Youngblood and I bought some in St. Joseph and small lots, two or more, from neighbors. I did that before I was injured and I saw the live stock when I bought it, but since

my injury, as a general rule, I have not been able to inspect the live stock, just buy it on order, leaving it to the commission man. When I buy from neighbors, sometimes I see the stock when just driving by and looking over the fence at them. (135-6) Before I was injured, when I sold live stock, I hauled some of them to market and had others drive them. I loaded them in the truck and unloaded them and I did the driving and the hired man helped. Since my injury I have not been able to do any of that work. I hire all the stock hauled. My injury didn't affect my mind in the least. I can direct other people to do things just as well as I could before. I can write checks, borrow money, execute notes, do banking just as I could before. I tell my hired hands what crops to put in and I consult about the time it is to harvest them, just as I did before.

Cross-examination.

By Mr. Becker:

At the time I took out the two policies of insurance involved in this suit, I took out two other policies of the defendant; the applications on each policy were introduced in evidence (Defendant's Exhibits 1 and 2). At the time the insurance was taken out I was living on the estate farm, consisting of about 200 acres, in which my mother held a life estate; prior to the time the policies were taken out and continuing until the time of trial, I leased the estate farm from mother; before the injury and until after the time of trial, I operated the 105 acre farm in connection with the estate farm. I was also interested in two other farms, one of which my brother and I owned together and I leased my interest in that farm to my brother and received as rent therefor one-fourth of the income of the farm up to 1935, when I sold my interest in this farm to my brother. Prior to the time I was injured, I was interested in a fourth farm [fol. 32] with my mother, which was owned one-half by her and one-half by me, and prior to my injury I managed that farm for myself and my mother. Up to 1936 I leased that farm for my mother and myself, and my mother and I received the rents. In 1936 the farm was sold by my mother and myself and up to that time I had charge of the farm under the same arrangement with my mother. (144-5) With reference to the estate farm, I lived on it before and after my injury, and was in charge of the operation of that

farm before and after my injury and I am now. With reference to the 105 acre farm, prior to my injury, it was operated as a part and unit of the estate farm and was under my control and supervision prior to my injury.

Q. And since your injury and since the time the company discontinued benefit payments, the 105 acre farm has been operated in the same manner in connection with the estate farm under your management and control, that's right, isn't it?

A. You mean to tell me it was operated exactly as it was before? (145)

Q. I didn't mean been operated the same so far as your management and control is concerned, been operated with the 200 acres, that's right, isn't it?

A. Yes, sir.

Farm Number 3, owned by myself and my brother, before it was sold in 1935 was handled in the same manner prior to my injury as it was handled up to the time it was sold, and under the same agreement. I consulted with my brother about the operation of it prior to and after my injury. I leased him my interest by verbal lease and prior to my injury, my brother operated that farm but since my injury not with my help, and I received one-fourth of the proceeds.

Q. With your consultation, I'll put it.

A. I didn't—I haven't helped him any with it.

Q. I don't mean, do any physical labor, you consulted with him?

A. Yes, sir.

Q. About the operation since your injury?

A. Yes, sir.

The fourth farm I had charge of leasing and handling of the farm as landlord, prior to my injury and subsequent [fol. 33] thereto. I sanctioned the manner in which the place should be farmed by the tenant and made settlements with him and received my portion of the rental and I suppose I paid over my mother's portion of the rental to her both prior and subsequent to my injury. If there were any repairs to be made on that farm, I authorized them. (146-7) At the time I took out these insurance policies, I had two men regularly employed on the estate farm, and in addition, I had men by the day. Since September, 1933, I continued the practice of calling in additional help during the rush

season but since that date I have had but one man regularly employed.

Q. So that since September 29, 1933, the time the company discontinued benefit payments, you have had one less man on the place regularly than you had before?

A. Yes, and you want me to explain that to you?

The Court: Yes, go ahead and make your explanation.

A. We operated this land with horses and mules and now we operate it with a tractor, more modern machinery, and that accounts for the difference in the men.

Mr. Becker: Machine age displaced them—you find one man is sufficient to handle that now?

A. With additional help in season, when he needs it.

Q. That is what I mean.

A. Yes, sir. (150)

Prior to my injury, the estate farm was operated as a grain and stock farm, buying stock and feeding the products of the farm to them, and since September, 1933, I have continued to operate that farm as a grain and stock farm, buying stock and feeding to them the feed raised on the farm. (150)

Q. Now Mr. Stoner, with reference to the—not with the supervision and control and management but with reference as to who is charged with the responsibility for looking after the operations of the farm, in 1928, 1929, 1930 and 1931, your man was charged with that responsibility of looking after it, wasn't he, this man Amphor?

A. With my help.

[fol. 34] Q. Well, he was charged with the responsibility of it, responsible to you for it, wasn't he?

A. Well, in a way yes, sir.

Q. That was prior to the time before you were ever injured?

A. Yes sir.

Q. Since that time, during the years 1934, 1935, 1936 and up to 1937, that man was in charge and responsible to you for the operation of the farm as before, wasn't he, that man Amphor?

A. Without my help.

Q. Without your physical assistance?

A. Yes, sir.

Q. Outside your physical assistance, the same conditions obtained?

A. Practically.

Mr. Becker: I say, in 1928, 1929, 1930 and 1931, before you were injured, your man was in charge of the business and you had only to see when the cattle were bought and what was paid for them, didn't you?

A. I had only—no, I told you that I helped with all this work, Mr. Becker, all the time.

Q. Now I call your attention to certain questions and answers that were asked you in the trial in St. Joseph and just ask you if these questions weren't asked you and if these answers weren't made by you: "Q. Now, of course, in 1928, 1929, 1930 and 1931, your man was in charge of the business and you had only to see when cattle was bought and what was to be paid for them", and if you didn't answer "Yes, sir", and if the next question wasn't asked you, "And the same was true in 1933 and 1934?" and if you didn't answer, "Yes, sir"?

A. Yes, sir.

Q. Those questions were asked and those answers were made?

A. Yes, sir. (Record 151)

Mr. Phillip: Pardon me, Your Honor. If he is going to read those two questions and answers, I ask that he be required to read the next question and answer right following.

[fol. 35] The Court: You will be permitted to do so. Just mark the place. (152)

Mr. Phillip: All right.

Mr. Becker: Now, Mr. Stoner, prior to the time you were injured you depended in the operation of that farm on this Mr. Amphor whom we call your "right hand man" and you continued to depend on him in the operation of it since your injury haven't you?

A. Yes, sir.

Q. That's true. Now with reference to the manner in which this farm is being operated since your injury you are still feeding cattle and selling them and feeding hogs and doing everything you did in the operation of your business before with reference to the management and operation of that farm are you not?

A. Yes, I believe I am.

Q. And you are doing that for the purpose of making livelihood out of the farm are you not?

A. Yes, sir.

Q. Now Mr. Amphor was employed before you were injured under an understanding between you and him that he should have a place to live on the place and a garden and you were to pay him the prevailing wage for farm laborers at that time?

A. Yes, sir.

Q. Prior to the time you were injured you furnished Mr. Amphor a place to live and a garden on your place and paid him the prevailing wage for farm laborers at that time?

A. Yes, sir.

Q. Now since your injury Mr. Amphor is still living in the same place isn't he?

A. Yes, sir. (153)

Q. And he still has a garden there, that right?

A. Yes.

Q. And you are paying him now up until the commencement of this season nine dollars a week which is the prevailing wage for farm laborers who live upon the place in your community, that right?

A. Yes, sir.

Q. Now you continued to do the purchasing of your equipment for use on that farm, haven't you?

[fol. 36] A. Yes, sir.

Q. Whenever you want to handle livestock, deal for the purchase of livestock, you have attended to that personally haven't you?

A. Yes, sir.

Q. And you have done quite a bit of trading in livestock since the time you were injured haven't you?

A. I have bought some livestock.

Q. Well, you bought livestock from Lush-Youngblood in Omaha?

A. Yes, sir.

Q. You have gone to St. Joseph and bought livestock?

A. Yes, sir.

Q. And from the neighbors?

A. Yes, sir.

Q. From time to time after feeding that livestock you have sold it off?

A. Yes, sir.

Q. And you have done that for the last nearly four years for which you have received no compensation from the company?

A. Yes, sir.

Q. Now during the time you were in the hospital after your injury, which you say was about two months, the company paid you what the policies called for didn't it?

A. Yes, sir.

Q. And during the time you were in bed three months at home the company paid you what the policies called for didn't they?

A. That is, I judge three months you see.

Q. I say, when you were home,——

A. That was the first payment? (154)

Q. I mean you have been paid all the way back to the time,——

A. (Interrupting) Yes, sir.

Q. Up to the time, three months you were in bed at home. You testified yesterday you were on your back five months?

A. Yes, sir.

Q. For that period of time you received payments that the policies called for?

A. Yes, sir.

[fol. 37] Q. Now then you spent a month in a wheelchair that you enumerated yesterday, about?

A. Yes, sir.

Q. I don't mean to be exact. That's your judgment?

A. Yes, sir.

Q. You received payment for that?

A. Yes, sir.

Q. Then you were on two crutches for a couple of months or two months?

A. Whatever time it was, yes.

Q. That's your best recollection about that?

A. Yes, sir.

Q. And you received your benefit payments for that?

A. Yes, sir.

Q. Then you were on a crutch and a cane for a while?

A. Yes, sir.

Q. You received benefit payments for that?

A. Yes, sir.

Q. And then you got on one cane and,—well, I'll put it

this way, you received benefit payments from the company from June 29, 1931 to September 29, 1933?

A. Yes, sir.

Q. Period of over two years?

A. Yes, sir.

Q. The company paid you during that time the sum of $3375.00? (155)

Mr. Phillip: We object to that; it is immaterial what the company paid him; it is what they haven't paid him.

The Court: Sustained, stricken out and the jury instructed to disregard it.

(To which action and ruling of the Court, the defendant, by counsel, then and there duly excepted at the time, and still excepts.)

Mr, Becker: Now, Mr. Stoner, since you have been able to get around with one cane, which is about eight or nine months after you were injured, since that time you have been able to drive your automobile haven't you?

A. Yes, sir.

Q. You don't have hand controls on it, you use your feet like everybody else does?

A. Yes, sir.

[fol. 38] Q. You have driven your car from home to Omaha?

A. Yes, sir.

Q. Up to the stock yards?

A. Yes, sir.

Q. Accompanying shipment of stock?

A. Yes, sir.

Q. You have driven your car from up at Watson down South about a hundred miles down to St. Joseph haven't you at various times?

A. Yes, sir.

Q. I don't know how far?

A. About that.

Q. That's about a hundred miles?

A. About 100 or 90 miles.

Q. And you have driven your car around other places you want to go?

A. Yes, sir.

Q. And from time to time when stock has been—you have traded and sell stock in the market in Omaha you've

gone up there and seen your commission man and been in the city at least and at the yards or at the commission man's office when stock was handled there haven't you?

A. Yes, sir. (156)

Q. Did you deal with Lush-Youngblood Commission house before you were injured?

A. Yes, sir.

Q. How long have you been dealing with those people?

A. Oh, I don't remember.

Q. I mean, been a great number of years?

A. Yes, quite some time.

Q. Sir?

A. Quite some time.

Q. And they have handled stock for you before you were injured?

A. Yes, sir.

Q. Now with reference to the stock that was on the farm since your injury you have observed that livestock, looked after it, kept yourself informed and acquainted with what was on the farm, haven't you?

A. Yes, sir.

Q. Now that farm you have there is mostly bordered by roads?

A. There is a road through it, yes, sir.

Q. Well, I'll say it is pretty well bordered by road?

A. There is a road between the two farms.

[fol. 39] Q. To refresh your recollection I will ask you if at St. Joseph if you weren't asked this question and you made this answer, page 76: "The farm is mostly bordered by roads?" And if you didn't answer, "Pretty well bordered by roads, yes, sir?"

A. Yes, sir.

Q. That right?

A. Yes, sir.

Q. And you can drive a car around that farm anywhere a binder or mowing machine can go?

A. Yes, sir.

Q. And since your injury you have gone out, out into the alfalfa field and consulted with your man about the weather conditions and the cutting of your alfalfa, haven't you?

A. Yes, sir. (157)

Q. You have done that since September 29, 1933, up until today, that right?

A. I have drove out into the field, yes, sir.

Q. I mean for the purpose of looking after your crops?

A. Yes, sir.

Q. Now with reference to the physical labor, you had prior to your injury in the way of helping Mr. Amphor and this other fellow that you had there for a time, that manual labor which you spoke of in the way of plowing and disking, harrowing and feeding, I believe breaking up corn cobs, corn off the cob, whatever they said, Mr. Amphor has either attended to that or you have had an extra man in rush season, haven't you?

A. Yes, sir.

Q. And that's the type of labor which you did which was described, plowing and disking, harrowing, hauling corn?

A. Yes, sir.

Q. Yes, that's the type of labor you can very easily secure a hand to do, is that right?

Mr. Phillip: We object to the question; the question is whether he can do it, not what he can hire somebody else to do.

The Court: Sustained. (To which action and ruling of the Court, the defendant, by counsel, then and there duly excepted at the time, and still excepts.)

[fol. 40] Mr. Becker: Well, with reference to the way it has been operated you have had Mr. Amphor to do when it was in rush season, haven't you?

A. Yes, sir.

Q. Whenever you needed an extra man for instance when you were planting this spring you hired three additional hands?

A. Yes, sir.

Q. Prior to the time you were injured in the planting season you had three additional extra hands didn't you?

A. I don't remember, approximately that. (158)

Q. You also had this other man that was regularly employed?

A. Whatever help we needed.

Q. That was necessary?

A. Yes, sir.

Q. Now prior to the time you were injured somebody had to hire this extra labor, make the deal with them and pay them, who did that?

A. I did.

Q. And since your injury who has done that?

A. I did; I have.

Q. Now prior to the time you were injured someone had to map out the course which you were to pursue in planting of crops and buying of livestock, who did that?

A. I did.

Q. Now since your injury who has planned the rotation of crops and the method of operation of that farm?

A. I have.

Q. Now when you have extra feed around there prior to your injury who was it decided and made the deal to get extra stock to feed?

A. I did.

Q. And who bought those stock prior to the injury?

A. I did.

Q. And since the time you have been injured and since the disability payments have been discontinued who has determined that matter and bought stock and cattle to be put on that extra feed?

A. I determined the matter.

Q. And you bought them?

A. Sometimes, yes, sir.

Q. Say, you did buy from time to time as many as a dozen head of stock from your neighbors?

[fol. 41] A. Yes, sir.

Q. Different places?

A. Yes, sir.

Q. And from Omaha and St. Joseph?

A. Yes, sir. (159)

Q. You followed the same practice since your injury as you followed before your injury in determining when your cattle were ready for market and the time they were shipped and manner in which they were shipped?

A. Not the same but on the general order.

Q. I will not say the same but as a general practice?

A. Yes.

Q. Now with reference to the manner in which your hogs should be fed there and the directing the feeding of those hogs prior to the injury who directed the feeding of the hogs, the manner in which they should be fed and what they should be fed?

A. Well, I did and I fed them.

Q. You helped feed them?

A. Yes, sir.

Q. You had Mr. Amphor there and had another man regularly employed there, didn't you?

A. Yes, sir.

Q. Now since the injury you have continued to direct the manner of feeding those hogs haven't you?

A. Yes, sir.

Q. Given orders with reference to it?

A. Yes, sir.

Q. Now with reference to the cows, the number of cows you are going to keep, the number of the calves that you are going to raise, if you undertake to raise any yourself instead of buying them, you give the order and make the plans with reference to that?

A. Yes, sir.

Q. And you have done that before your injury?

A. Yes, sir.

Q. And you have done that since your injury?

A. Yes, sir.

Q. Now when it come- time to plow in the spring and the work has to be managed and supervised since your injury you've directed that plowing by giving orders both as to the manner, the field to be plowed and the time the plowing was to begin?

A. Yes, sir. (160)

Q. And you have done that in the operation of this "Estate Farm" under lease with your mother, that's right is it not?

A. Yes, sir.

Q. Sir?

A. Yes, sir.

[fol. 42] Mr. Becker: Now, Mr. Stoner, prior to the time that you were injured did you ever hire trucks to haul any stock going to market?

A. Yes, sir.

Q. And prior to your injury you made the arrangements with the trucks?

A. I did.

Q. Now since your injury you stated you employed trucks?

A. Yes.

Q. To haul stock to market?

A. Yes, sir.

Q. Have you?
A. Yes, sir.
Q. You did that yourself?
A. Yes, sir.
Q. That's one of the customary manners in your part of the country in which stock farmers get their stock to market?
A. Yes, sir.
Q. I mean farmers that are able bodied, one of the customary methods they use?
A. Yes, sir.
Q. You say, you can drive yourself?
A. Drive?
Q. Drive a car?
A. Yes, I can drive a car.
Q. And you can drive as far as the market usually?
A. Yes.
Q. That's at Omaha?
A. Yes.
Q. And that is sometimes to St. Joseph?
A. Yes, sir.

Mr. Kaufmann: Of course, we object to that as repetition, Your Honor.
The Court: Sustained.

(To which action and ruling of the Court, the defendant, by counsel, then and there duly excepted at the time, and still excepts.)

Mr. Becker: Now, Mr. Stoner, prior to the time you were injured somebody had to buy seed to be planted, choose the character of seed, who did that?
A. I did. (162)
Q. Now since your injury with reference to the operation of this "Estate Farm" that which you have had under lease with your mother who is it that's bought that seed and determined the character of the seed to be sowed?
A. I have.
Q. You have done that personally haven't you?
A. Well, yes, I have determined the character of seed.
Q. And purchased the seed?

[Vol. 43] Mr. Phillip: Wait a minute.
The Witness: I determine the character of seed whether I want to sow alfalfa, wheat, clover, Mr. Becker. My mind is all right; nothing wrong with my head.

Mr. Becker: You just answer my questions and you will do very well.

A. All right.

Q. Now prior to the time that you were injured in the fall it becomes necessary to supplement the pasture feeding the stock?

A. Yes, sir.

Q. Somebody has to watch that and determine the necessity and go into that, have to do that don't they?

A. Yes, sir.

Q. Now, prior to the time you were injured who was it watched about those stock and the conditions of the pasture and whether necessary to get supplementary feed?

A. I did.

Q. Now since your injury, since September 29, 1933, who has done that?

A. My man.

Q. I will ask you if your plan with regard to that if your man [man] didn't do that before your injury?

A. Well, yes, yes.

Q. I will ask you if you don't follow the same plan now that you followed before your injury with reference to that, with reference to the work you and your man do about it? (163)

The Court: I don't understand it. Go ahead, repeat that.

Q. I say, don't you follow the same plan and practice with reference to determining whether or not the pasture has become insufficient to carry the livestock and when it is necessary to begin to supplement feed now as you did before the injury?

A. No, I was out there then and knew.

Q. Is there any particular difference now?

A. Yes, it is different.

Q. All right, I am going to ask you if when you testified at St. Joseph, page 81, when you testified at St. Joseph, if these questions weren't asked you and if these answers weren't made by you after you had made a statement simi-
[fol. 44] lar to just what you made there: "Turn to page 53 of your deposition. I will ask you if these questions were asked you and you made these answers: Q. In the fall of the year who determines whether or not pasture has become insufficient to carry your livestock and whether it is necessary to begin feeding? A. Well, the man would know

more about that than I would, whether they need pasture or feeding. Q. Is your plan in regard to that now any different to what it was prior to June 29, 1931? A. Not especially, maybe.'' Were those questions asked you and the answers made by you? A. Yes, sir. Q. And that is correct, is it? A. Yes, sir, so far as I know.''

A. Yes, sir.

Q. And it is correct?

A. If that's what appeared there.

Mr. Kaufmann: We want to call the Court's attention we would read some questions that were asked just before that later. (164)

The Court: Very well.

Mr. Becker: I will ask you if before that deposition was read to you if you didn't give the answers just as you made a few minutes ago to these questions and to these answers to which Mr. Kaufmann referred before the deposition was called to your attention. Question, ''Well, sometimes in the fall of the year there is not enough of what you call pasture to provide sufficient feeding for the stock and you have to make a decision as to whether the condition of the pasture is such to carry your stock, you do that? A. It should be that way. Q. And you direct that to be done? A. No, I don't see the conditions and I can't. I have to take the word of the men for that.'' Those questions and those answers were made?

A. Yes, sir.

Q. Then you were asked about this in this deposition?

A. Yes, sir.

Q. And prior to 1934 except for helping Mr. Amphor out in the performance of manual and physical labor you have continued to operate that ''Estate farm''?

A. Yes, sir.

Q. Except what parts you have rented from time to time isn't that right?

A. Yes.

[fol. 45] Q. And you have continued in the control of the entire 305 acres there together since June 29, 1931, up until today?

A. Yes, sir.

Mr. Becker: Now when you go to market with stock you send either to St. Joseph by truck or Omaha by truck if that

is the way you send them for the purpose of selling that stock do you go along in the truck or drive your own car?

A. I have ridden in the truck little ways but I drive my own car, go with some of the boys. (165)

Q. Sometimes do it one way but most of the time you say you drive your own car?

A. Well, I go with the boys, brother, whoever is going.

Q. Now Amphor had been on your place—has been on your place for nine years about now hasn't he?

A. Something like that, good long time.

Q. Now with reference—some mention was made of your inability to see this stock with reference to the condition of this cattle. You yourself inspect that cattle from time to time don't you?

A. I see them, yes.

Q. Yes. Now when you sell,—you do sell some stock around there locally or you have since 1931 haven't you?

A. Yes, sir.

Q. Now when you sell stock around there locally you carry on the negotiations with reference to the sale of that and consummating the sale yourself personally don't you?

A. Some, yes, sir.

Q. Now the extra physical labor you had before, I believe you testified on direct examination that you hired a hand to do that work?

A. Yes, sir.

Q. And it hasn't been necessary for you to have him there all the time has it?

A. Well,——

Q. (Interrupting:) I mean the day hand to do that work?

A. No, not especially I guess.

The Court: Gentlemen, let's have a few minutes recess.

(Short recess.)

Mr. Becker: Now, Mr. Stoner, with reference to the operation of the farm for the season of 1937 and winter of 1936, has there been any crops put in on the "Estate Farm"?

A. Yes, sir. (166)

[fol. 46] Q. Tell the jury what has been put in on that farm for this year, for this season.

A. Well, last fall we sowed wheat and some barley, I believe pasture, and oats this spring and planted corn and sowed some alfalfa this spring.

Q. The alfalfa was reset this spring?
A. Yes, sir.
Q. And those crops are growing now?
A. Yes, sir.
Q. And you have inspected the progress of those crops this year?
A. I have seen them growing, yes, sir.
Q. Now prior to the time you were injured did you ever buy stock from a commission man before?
A. Yes, sir.
Q. And I believe it was from the same house?
A. Yes, sir.
Q. And now you buy practically all from Lush-Youngblood house?
A. Yes, sir.
Q. Now during the time for which monthly income payments were made to you by the company the premiums which became due on the policies were waived, were they not?
A. Yes, sir.
Q. And you knew as long as you were totally and permanently disabled you were entitled to the waiver of premiums?
A. Yes, sir.
Q. But since September 29, 1933, as shown by these exhibits you put in evidence you have paid those premiums, haven't you?
A. Yes, sir, and I will tell you why, Mr. Becker, I have paid those premiums.
Q. If you want to.
A. I was afraid that company would try to beat me out of these payments but I knew as long as I kept the premiums paid that they couldn't beat my wife and mother out of anything that was due.

(Narrative) I wrote the company requesting it to waive the premiums for 1932 and it did so.

Mr. Becker: This company has never reported to you or notified you your life insurance was not in effect as payable to your mother or brother have they?
A. No. (168)
Q. The controversy you've had with the company has

been limited as to whether or not you were totally disabled since 1933 hasn't it?

A. Yes, sir. (169)

Mr. Becker: You may inquire.

[fol. 47] Redirect examination.

By Mr. Phillip:

Q. Mr. Stoner, did you ever at any time have any agreement or arrangement with your mother about the use of her life interest in this "Estate Farm" or the management and operation of it other than you have stated, other than the rental agreement you have stated?

A. No contract.

Q. Well, arrangement at all, did you ever have any arrangement by which you were to become her manager?

A. Oh, no.

Q. Were you ever in her employ?

A. No.

Q. Did you ever manage this farm as her agent, her manager, work for her?

A. No, no, not as a partner, anything of the kind.

Q. Mr. Becker asked you this question whether you were in charge of this farm for yourself and your mother and you said yes, did you mean as her manager?

A. Oh, no. I am not employed by her, anything of that kind. I manage this to the best of my ability as I said before, if we make anything, get anything done with it, she gets her part of it. She don't employ me.

Q. For half?

A. Yes.

Q. You mean you rent this farm from her?

A. Same as I rent one from you.

Q. Now Mr. Becker read to you these questions and answers from your former testimony, page 69: "Q. Now, of course, in 1928, 1929, 1930 and 1931, your man was in charge of the business and you had only to see when the cattle were bought and what was to be paid for them? A. Yes, sir. Q. And the same was true in 1933 and 1934? A. Yes, sir." And you said that you so testified?

A. Yes, sir. (170)

Q. Now I am going to ask you if right immediately afterwards these questions and answers were asked you: "Q.

Now during all those years of feeding and selling cattle, etc., before you were injured, you did all that work? A. Yes, sir. Q. Since you were injured you have not been able to do it?" Objection sustained there. "Q. Who did that work or helped to do it before your injury? A. I did. Q. Who has done it since your injury? A. My man. Q. Are you able to do any of that work? A. No, sir. Q. Have you hired other people to do the work you had to do? [fol. 48] A. Yes, sir. Q. Do you have to do that? A. Yes, sir." Were those questions asked you and did you make those answers immediately after?

A. Yes, sir.

Q. Just one other question. I believe Mr. Becker asked you whether or not during the time you were laying flat on your back in the hospital, whether the defendant paid you the monthly installments that become due during that time and you said yes?

A. Yes, sir.

Q. That's right?

A. Yes, sir.

Q. He also asked you whether or not during the time you were able to be about on two crutches whether they paid you the monthly benefit installments accruing during that time?

A. Yes.

* * * * * * *

Mr. Phillip: About how long was it after you were injured before you got down to using one cane just as you do now?

A. About a year. (171)

Q. I mean how long was it before you were in the same condition that you're in right now?

A. That's what I mean, about a year.

Q. About one year. Now during that year when you were in the same condition you are in now up to September 29, 1933, did they pay you?

A. Yes, sir.

Mr. Phillip: That is all.

Recross-examination.

By Mr. Becker:

Q. Now about this arrangement with your mother. Mr. Phillip asked you whether or not you managed it as an em-

ployee of your mother. You managed that farm for yourself as tenant of your mother?

A. Yes, sir. (173)

Q. Just the same as you say if you wanted to lease a farm from Mr. Phillip?

A. Yes, sir.

Q. And your mother was—the arrangements you had with her was that you would pay the operating expenses of that farm including taxes and insurance, things of that sort?

A. Yes, sir.

* * * * * * *

[fol. 49] Q. The arrangement was then you would take your living out of it, your livelihood wasn't it?

A. Well, to that effect, yes, sir.

Q. And that's what you did, wasn't it?

A. Yes, sir.

Q. Then you were to pay her her portion or half of the profits after that?

A. Well, she also had living.

Q. And you paid money to her from time to time?

A. Yes, sir.

Q. Now the rental wasn't a stipulated certain amount like you would draw a contract with Mr. Phillip for his farm was it?

A. No.

Q. It was always understood between you and your mother for your services and as her tenant and part of the agreement you were to withdraw from the proceeds of that farm the money required for you to live on, that's right isn't it?

A. I got my living out of the farming, yes, sir. (174)

Q. And during the period covered by this suit and to September, 1933, you did make your living out of that farm didn't you?

A. Yes, sir.

Q. And you are making your living out of it now, aren't you?

A. Trying to, yes, sir.

Q. And at times there is a profit over which you pay over to your mother her portion?

A. Yes, sir.

* * * * * * *

Q. And with reference to last year, the year 1936, out of the income of that farm came your livelihood?

Mr. Becker: Is it admitted that's true?

Mr. Phillip: Yes, it is admitted up to this date.

Mr. Becker: That's fine. Thank you, Mr. Phillip. That is all.

Further Redirect examination.

By Mr. Phillip:

Q. Now, Mr. Stoner, just one other question. Mr. Becker asked you whether of not during the year that you were walking on one crutch and while the company paid you up until the year before September 29, 1933, when they [fol. 50] stopped paying during that time you said you were walking on one crutch or one cane I mean?

A. Yes, sir.

Q. Now your condition to that period, I will ask you whether or not during that period the medical examiner of the company came out there and examined you and knew your condition?

A. Yes. (175)

Mr. Phillip: That's all.

Further Recross-examination.

By Mr. Becker:

Q. I have one other question, Mr. Stoner. During that period up to September 29, 1933, you were under the care and receiving medical treatment from a doctor weren't you?

A. Yes.

Q. And about the time that the company discontinued payments was the time you discontinued treatments wasn't it, just about that time?

A. Oh, no, no.

Q. Sir?

A. No.

Q. Well, I don't mean,—how's this, like you were going to the doctor you say one time a year, two times a year now?

A. Well, something like that.

Q. But you haven't received any treatment for this since 1934 have you?

A. Well, I didn't receive any—practically any treatment, Mr. Becker, in the last year the company paid me. I didn't receive any treatment, practically any.

Q. You know what I mean, treatments?

A. Well, they said there wasn't nothing could be done for me.

Q. Let's see, just a minute. You caused some reports to be made to the company by Dr. Gray as your attending physician, didn't you?

A. Yes, sir.

Q. And weren't you under the care of Dr. Gray at that time?

A. Yes, sir.

Q. And you caused him to send in reports that have been marked Plaintiff's Exhibits 4, 5, 6, 7, 8 and 9 to the company as your attending physician, didn't you?

A. Yes, sir.

Q. And as the man under whose care you were at that time?

A. Yes, sir.

Q. Now then, you say, that Dr. Gray wasn't your attending physician then?

A. Oh, he was.

[fol. 51] Q. Sir?

A. He was but what I mean was,——

Q. (Interrupting) Well,——

Mr. Phillip: Just let him answer the question. We object to that, and ask the witness be permitted to answer.

The Court: Go ahead, make your answer.

A. What I mean I don't know if it was healed, almost healed, of course, it was he was attending to it.

Mr. Becker: Well, I am just saying you had a physician attending you?

A. Yes, sir.

Q. During that time?

A. Yes, sir.

Q. During the time the company made those payments?

A. Yes, sir.

Q. And about the time those payments were discontinued was about the time you discontinued the regular care of Dr. Gray, isn't that right?

A. Well, I don't just remember, Mr. Becker.

Q. Well, I mean your best recollection it was about that time?

A. Well, I see Dr. Gray. We see each other as I said.

Q. But you told me before that he wasn't treating you now, didn't you, that you hadn't had any examination,——

The Court: You are confusing treating and attending. He was answering while ago about,——

Mr. Becker: I object to the comment of the Court in the presence of the jury here. I object to the Court and take exceptions to the remark of the Court in commenting upon the evidence in this case.

Mr. Phillip: I take exception of the conduct of counsel trying to make this witness think attend and treat is the same thing. He doesn't differentiate between the two. (177)

The Court: That is what I was saying. I was trying to straighten the witness out.

Mr. Becker: I take an exception.

The Court: All right.

[fol. 52] Mr. Becker: Did you see any of these reports Dr. Gray filled in?

A. I don't remember whether I did or not, Mr. Becker.

Q. Now you say at the time you were being paid these benefits after you had gotten on one cane, you say, your ankle was almost healed, I believe that was what you said?

A. I can't remember. I don't remember,——

Q. (Interrupting) Well, it was still,——

Mr. Kaufmann: Just a moment.

A. I don't remember the date at all, Mr. Becker. I don't remember when it was fully healed.

Mr. Becker: Then you can't say?

A. I don't remember whether I was on a cane or crutches a month; I don't even remember when I got to walking with one cane. That's what I am trying to get at.

Q. Then you can't say with certainty, any definite recollection that you were not convalescing at the time these payments were made to the fall of September 29, 1933, because you don't remember just with any definiteness when it occurred?

A. I said I couldn't say definitely whether healed. You know what I mean.

Q. You couldn't say then your condition was exactly the same then as it is now, can you?

A. I don't see any difference in the last half year or year they paid me and now. That's what I am trying to get at. (178)

Q. But at that time you first had an open wound there, didn't you?

A. Yes, sir.

Q. Which had healed up?

A. Yes, sir.

Q. And that's healed up?

A. Yes, sir.

Q. And there was a greater degree of soreness?

A. Yes, sir.

Q. That's tapered off gradually there?

A. Yes, sir.

Q. Just when you reached the present condition you don't recollect yourself?

A. No, not exactly. That's what I was trying to tell you. I don't know whether that was say in,—I am trying to compare it with September, 1932 or 1933.

[fol. 53] Mr. Kaufmann: 1933?

A. That's when they ceased paying me. [1] I don't think my condition is any better, say, in May, June or July of that same year. That's what I am trying to get across.

Q. Yes, but you can't recollect with any definiteness just when your present condition—what month your condition reached its present condition?

A. That's just what I answered.

Q. And you were comparing your condition in September, 1933, when they quit paying you with the present?

A. No.

Q. Didn't you just say that?

A. No.

Mr. Kaufmann: We object to that, continuously trying to mislead him.

The Court: Go ahead. Cross-examination.

Mr. Becker: Now since, 1934, you have not received any treatment for this condition have you?

A. Treatment or attention?

Q. Well, you tell me what you mean. I say, you haven't received any treatment?

A. There hasn't been any treatment for it they said. (179).

Q. Just answer my question, have you?

A. No, no treatment.

Q. And sometime prior to 1934 you discontinued the services of Dr. Gray, didn't you?

A. No, not attention.

Q. Has a,—treated you? I'll get at it, has a doctor treated you?

A. Prior to 1934?

Q. Yes, sometime prior to 1934?

A. Well, I would say no.

Q. You were in the Court Room at St. Joseph when Dr. Gray testified, weren't you?

A. I believe I was.

Q. Didn't you hear Dr. Gray say,—page 38—didn't you hear Dr. Gray say at that time in answer to the question, "You are not treating him for anything now? A. No."?

A. I don't remember that.

Q. If Doctor said it he was right, wasn't he?

Mr. Becker: Well, I thank you.

[fol. 54] Further redirect examination.

By Mr. Phillip:

Q. Just one other question. I notice you have got your shoe unlaced there this morning?

A. Yes, sir.

Q. That's on your crippled foot?

A. Yes, sir.

Q. Why do you have it unlaced?

A. Well, it's been paining me bad all morning.

Q. Is that the result of walking around?

A. From the trip and yesterday and all.

Q. Is it swollen this morning?

A. Yes, sir.

Mr. Phillip: That is all.

Further cross-examination.

There is nothing the matter with my right foot, right ankle, right lower knee, right thigh, left thigh, left knee, internal organs, spine, hips, lower back, ribs, heart, stomach,

left hand, left wrist, left forearm, left elbow, left upper arm, left shoulder, left upper back between the shoulders, right shoulder, right upper arm, right forearm, right hand, right wrist, neck, head, eyes and throat. (180-181)

Mr. Lawrence C. Stoner testified:

I am a brother of Lewis K. Stoner. I live about 5 miles from the estate farm and have since 1910. I remember his accident. Prior thereto I would be over on the farm he rented and the one he owns maybe once a month, maybe once a week, and I know of my own knowledge the work he did on that farm before he was injured. In a general way he was able to do everything there [wat] to do on a farm such as going out and making crops; breaking horses, dealing in hogs or dealing in cattle or sorting cattle; scooping corn; disking or listing or plowing or anything there was to do; milking [coes] and such stuff. He was able to feed and haul live stock. Since his injury I visited him many times.

Q. Well, what work has he been able to do or has done on that farm since that time?

A. Well, he has done nothing so far as labor is concerned. His mind has not been affected in any way or his judgment to my knowledge. (182)

[fol. 55] Q. Has he been able to hire people, pay them, direct them what to do, tell his men on the farm—his head man what to do, what crops to plant and when to plant them, how to plow and when to gather the crops, all those things? Has he been able to do it just as he did it before?

A. As he did before?

Q. Yes, sir.

A. No, sir.

Q. What difference—what is the difference in those matters?

A. Well, he couldn't get out in the field to see how it should be done as it was before.

Mr. Becker: We move the answer be stricken out and jury instructed to disregard it.

The State Circuit Court: Sustained.

Q. Since that time have you ever known him to go down into the field where the work was to be done and oversee the

work he direct to be done to see it was done, did you ever know him of doing that?

A. Known of him at times being out if I should happen to be there, sometimes we would go to the field to look over something, something like that. Go in a car, never to walk out. I have observed him walking in this court room and never since his accident have I seen him walk differently.

Q. In other words, does he put on that limp, dragging of the foot, did you ever see him that he didn't do that?

A. No, always since he has walked with a cane (183).

Q. You may state whether or not he complains of pain or not when he uses his foot to any extent?

Mr. Becker: We object to that because a complaint unless shown simultaneously exclamatory in nature would be a mere self-serving statement.

Mr. Phillip: When he walks any distance have you ever heard him complain of any pain?

Mr. Becker: We object to that. Not covered by the pleadings in the petition.

Mr. Phillip: Since he was injured?

A. Yes, I have.

[fol. 56] Q. Have you observed his ankle when he walks on it whether it swells?

Mr. Becker: We object to that.

Mr. Phillip: Since he was injured?

The Court: Overruled.

A. Yes, I have.

Q. Well, what does he do when he walks on it for three or four blocks, if you know?

Mr. Becker: We object to that. Isn't covered by the time in the petition.

Mr. Phillip: Since he was injured?

The Court: Overruled.

Q. Up to this date from the time he was injured up to this date if he walks three or four blocks on his foot what is the result?

Mr. Becker: We object to that because,——

Mr. Phillip: That you have observed yourself?

A. He plays out practically.

Q. What effect, if any, have you observed it had on his leg or ankle?

Mr. Becker: We object to that, your Honor, because it calls for matters not in the province of a lay witness with reference to the causation of the thing that might be produced. Not limited to the time for which compensation is claimed in this case. We ask all prior questions along this line when the same objection was made, not limited to the time of the petition, be stricken out and the jury instructed to disregard them for the reason they all say "since he has been injured", and, of course, the company has paid him all the time.

The Court: Of course, that objection was not made at the time, Mr. Becker. Overruled.

Mr. Phillip: From the time this man was injured up to this date how far can he walk without exhaustion from your own knowledge? Now what does he do when he walks three or four blocks, five blocks?

[fol. 57] Mr. Becker: We make the same objection.

The Court: Overruled.

Mr. Phillip: Since this man was injured, your brother was injured and up to this date when he walks three or four blocks or a distance of that kind what effect, if any, do you see on him? Just what did you see?

A. Why, I seen him sit down. Seen him rest his leg.

Q. What effect did you see during that time on his ankle when he walks any considerable distance? Just what you have seen in the appearance of his ankle. Is there any difference in the appearance of his ankle in the size of it?

A. Well, of course, I couldn't tell with shoes on stuff like that.

Q. You couldn't tell whether it swells or not?

A. Not to that effect.

Mr. Phillip: Very well, that is all.

Cross-examination.

By Mr. Becker:

I heard part of my brother's testimony here. So far as I know I think he has been engaged in the big end of those things he testified he was actually engaged in (186).

Mr. Phillip: I want to read to the jury a part of the answer, amended answer indicated here in ink as an admission.

Mr. Phillip then read from the answer as follows: "That the injuries and disability of plaintiff is and has been since September 29, 1933 permanent and fixed in character, consisting of a previously fractured and now stiff and immobilized ankle, the controversy in each case being the extent of the injury and disability, if any, and the making of due proof thereof" (186-187).

Dr. J. A. Gray, testified:

That he had been a regular practicing physician for thirty-four years during which time he knew Mr. Stoner and had attended him some. The witness recalled Mr. [fol. 58] Stoner having received an injury occasioned by a truck running into his wagon and throwing him out June 29, 1931. Someone picked him up in an automobile and brought him to my office. He had a compound fracture in this location (indicating). He had been thrown in such a manner that when he struck on his left foot these bones on the outside of the angle burst*ed* right through the flesh and skin and the foot was dislocated, turned around in this fashion (indicating), the toe pointed back this way and this tip of the inside bone here was broken off. There was also a fracture up here (indicating), a split in the bone. The entire ankle was exposed. It was very much as if you had taken a knife making about half of a cut through. That is, cut about half-way through (87) the joint and about half-way around the ankle and breaking it back. It was entirely exposed. The joint was full of dust and of course he was suffering a good deal of shock and pain. He had infection which was a direct result of the dirt to the extent that for weeks his entire foot was swollen and also his ankle and leg up to his knee. After he had been in the hospital about two months he was brought home. The joint was still open to some extent. It was not healed and it was draining for a long time, several weeks, and there was considerable pain attached to it and swelling; he was in bed for several weeks and then finally by days he was in a wheel chair, and from that to crutches, and in a slow process the injury did get

better to the extent he was relieved of the infection and was able to begin to put a lot of weight on his foot (88). At first he was just barely able to put his foot on the ground, on the floor, and by progressive steps he was able to eventually walk as he has today with a cane. First he had two crutches, then a crutch and a cane, then he walked with two canes for a while and now for the last four or five years with one cane. He has never been able to walk without a cane and in my opinion he never will. As to the present condition of the ankle and as it has been since the last three or four years, as a result of the infection his ankle is ankylosed. There is no movement left in the ankle joint at all. It is entirely stiff as if it were set in cement. In other words, there is just one solid bone where there used to be a joint. There is no remedy for that condition.

[fol. 59] Q. How about the condition of his foot control, when he walks on the injury, I mean.

A. Well, as a result of his stiff ankle, it has caused the loss of the use of his toes. That is, he can't raise his toes up like that (indicating) and he can't walk straight out on that foot like normal for the reason that it will not support his weight on the end of his toes. He has got to club his foot around and try to walk on his heel (89).

(Narrative.)

As a result, having to walk in an unnatural position that way he would naturally tire and he would suffer pain. It is my opinion he suffers pain every time he puts his weight on that foot. His left foot in the measurements around the instep from the heel around the ankle and up above that is approximately three-quarters of an inch larger than the other foot in the same measurements. The circulation has been badly disturbed in that foot as a result of inflammation and swelling which will never leave entirely, and no question but it affected the veins and the pressure of the veins. His circulation in that foot is not good as it is in the normal foot. Therefore his foot is more or less cold all the time. In the past year or so we have practically given up trying to do anything for his foot because there was just nothing to do, but before that time we treated him a great deal.

Q. Before that time had you hoped he would be able to use it to some extent or not?

A. Well, I possibly did. I think we hoped with some optimism that it might be some better some time (90).

Q. What in your opinion, doctor, will be the duration of the condition you have described both as to the condition of his foot and ankle and as to the pain?

A. Well, considering the history of the case and the length of time that it is I can see no reason to expect any change as long as he lives.

Q. Suffer the same pain?

A. Yes, sir. His ankle is hopelessly ankylosed.

(Narrative.) Since 1920 I have owned a farm and I know the work that a farmer ordinarily does on a farm. I am acquainted with farming.

[fol. 60] Q. What are the customary and usual duties a farmer has to perform if he is a cultivating farmer?

A. Well, he must be physically fit to handle horses, hitch up his team, be on his feet; he must be able to go out in the field and do a day's work. If he is listing he must use a riding or walking lister. In other words, he must be an able-bodied man to do during the day's work on a farm whatever he does.

Q. Is it one of the substantial duties of a man engaged in farming to plow, sow and harvest crops?

A. Yes, pitch hay (91). A man to be a dirt farmer——

Mr. Becker: Just a minute. I object to that and move the answer be stricken out because it calls for comparison and invades the province of the jury and determines one of the issues that must be submitted to the jury.

Mr. Phillip: No, I asked him if he knows.

Mr. Becker: That will be included in the instructions to the jury. I move his answer be stricken out and the jury instructed to disregard it.

Mr. Phillip: I am asking this witness of his own knowledge if he knows.

The Court: Overruled. Go ahead. (To which action and ruling of the Court, the defendant, by counsel, then and there duly excepted at the time, and still excepts.)

Mr. Phillip: Just go on and tell some other things customarily, usual and necessary things a farmer does in the prosecution of that occupation.

A. Man to be a dirt farmer,——

Mr. Becker: Just a minute. Not responsive to the question. He says a man to be a dirt farmer. No evidence in the record that is the case here.

The Court: That's all he is, a dirt farmer. Go ahead.

Mr. Phillip: Just leave out the dirt farmer. Just a farmer as you understand the word. Just assume that a farmer is one who manages and controls his own farm; either owns or rents and cultivates the soil. Now what does he do; what are the customary and substantial things he does?

[fol. 61] A. He must go out and run his tools, list; he must plant his corn; cultivate his corn; go through with a hoe and cut weeds out. Got to be able to follow along the side of the wagon shucking corn; scoop it. Million other things a farmer has got to do with physical strength.

Q. How about feeding stock if he is feeding stock, does he have any duties to perform?

A. Yes.

Q. What generally does he do?

A. Well, when I feed cattle we take a team and wagon out,——

Q. (Interrupting.) Not what you do. What does a farmer do?

Mr. Becker: Now, your Honor, we object to this examination; not limited to this case. Asking generally what a farmer does. Everyone of these men knows better than he does. Matter of judicial knowledge. Invades the province of this jury.

Mr. Phillip: Your Honor, I knew as stated at the beginning of this case we would have to ask questions we think these jurors would think silly. We have to get it in this record.

The Court: Overruled.

(To which action and ruling of the Court, the defendant, by counsel, then and there duly excepted at the time and still excepts.)

Mr. Becker: We are objecting further because not limited to the facts of this case because the question of what this man did whether disabled in his case they are different from what they call a dirt farmer, horseback farmer.

The Court: We don't have those, Mr. Becker, in this state.

Mr. Phillip: Mr. Stoner testified he actually did all these things.

The Court: That's right.

Mr. Phillip: I am asking him if he knows that those are the material things a farmer does.

[fol. 62] Mr. Becker: That's what I am objecting to, asking about the material and substantial things.

The Court: This man says he is a farmer and he knows about it. Go ahead.

Mr. Becker: Did he say he was a farmer?

The Court: He said he had a farm.

Mr. Phillip: Do you live among farmers?

A. Yes, sir.

Q. Do you own a farm?

A. Yes.

Q. Did you ever work on a farm?

A. I sure did.

Q. So you know what the ordinary and customary work of a farmer is that cultivates the soil?

A. Yes, sir, I know.

Q. Now go on, if he buys some stock and feeds it on his place what is the necessary physical work he has to do?

A. Well, in feeding cattle he must be able to scoop corn, break corn around the bins, if it is ear corn, be able to empty sacks, be able to pump water, be able to fix fences.

Q. Now, doctor, of your own knowledge on examination of Mr. Stoner, his condition for the last six years, state to the jury in your opinion whether Mr. Stoner is now or hereafter ever will be able to do any of those things, any physical work of that kind.

A. No, sir, he will not. (94)

Mr. Phillip: Is there any reasonable certainty this man's condition will improve as long as he lives?

A. No, there is not and I want to explain my answer to that.

Q. All right, go ahead.

A. Medical history and experience tells us that whenever the joint is torn open and infected that joint is destroyed for all time, and that being the case in Mr. Stoner's case where the joint was entirely opened up and infected, we have no reason to expect that the joint will ever be different from what it is today or get any better.

Mr. Becker: We move that all the answer be stricken out. It was not asked in regard to this condition. We have admitted that all along. We object to that answer and [fol. 63] move it be stricken out and the jury instructed to disregard it.

Mr. Phillip: We will withdraw the answer and let it be stricken out in view of the fact they have admitted it (95).

Witness: The company sent me blanks to fill out which I did.

Q. Did you at any time during this treatment consider that Mr. Stoner would ever be able to do any work of any kind.

A. Well, I think I probably did something of the kind.

Q. Was he ever able to do any farm work such as we have talked about here, has he ever been in condition at any time to do any of that kind (95) of farm work since he was injured?

A. Oh, no, he hasn't.

Q. Now, doctor, as time went on, did you at any time have any hope of him being able to do the work of a farm laborer?

A. Well, it might be I entertained some hope. We try to be optimistic with all patients.

Q. As things have now developed, as you now know them without any opinion, was he ever able—you said (in your report) "you thought he might be able to go back to work, be several months. Therefore, I consider him disabled now for the next several months at least". Now after those months went by, 1933, 1934, 1935, 1936, 1937, what do you find the actual fact to be as to whether or not he could perform any farm labor, any physical work of any kind?

A. Well, as to being able to go out and do a man's work——

Q. (Interrupting.) You say man's work. Can he perform any physical work at all?

A. No. (109)

Cross-examination.

By Mr. Becker:

I first had an opinion that the plaintiff would be able to work after several months but that has been dissipated by experience. At the time I sent each of my reports to the

company in which I said he probably would be able to do [fol. 64] some work, that was my opinion at the time (110-11). When I testified in the original Buchanan County action in 1934 I testified that my opinion this man would never be able to do manual farm labor on the farm of the nature described in my answer to questions propounded by Mr. Phillip, was formed the first time I ever saw him after he was hurt. The company submitted this question: "What is your opinion as to whether or not the insured by reason of his disability will be permanently, continuously and wholly prevented thereby for life from pursuing any ordinary gainful occupations?" And the answer in my report is: "I don't think he will be crippled for life to the extent that he cannot ever follow some gainful occupation, but he will not be able to work for several more months" (112). Each time I made a report I stated in my opinion he would be disabled for several more months, and he was (114). I testified as to the duties of a farmer from my experience and operation of a farm and working on a farm. I operate a farm by hiring a man by the month to run it and do the manual labor (114-115). I never said I was a farmer. I said I had worked on a farm. Generally speaking, Stoner's condition can be described as a stiff ankle with calcification of the tendons, meaning that there is a deposit of calcium where the tendons join the bone (116). When I ceased treating Mr. Stoner in 1934 I hadn't attempted or secured any other result with regard to his ankle.

Q. Now the pain that Mr. Stoner suffers is not due to any diseased condition but is due to a pulling of those tendons where they are fastened there when there is a strain on the ankle, isn't it, where fastened by calcification?

A. That is the main thing, yes.

Q. Now then, the suffering of pain in a patient is what you know as subjective symptom, isn't it? In other words, you mean by that you have no way of knowing a man suffers pain except what he tells you and the history of the case you have at hand?

A. Oh, I think we know when a man is suffering pain lots of times.

Q. I say, but when it is not suggested by any involuntary suggestion or spasm of any sort it is a matter of taking his word for it isn't it?

A. Not altogether.

[fol. 65] Q. Well, I will say in this case the statement that you made where some pain was suffered when the man walks is a subjective symptom, isn't it?

A. Yes, the pain is subjective (118).

Redirect examination:

Q. Mr. Becker asked you whether or not pain was a subjective symptom. That is something you can't see, you said. Can you tell, doctor, form an opinion regardless of what the man himself says, can you form an opinion from the nature of the injury that this man is suffering pain or not? Say he walks, as to whether or not he actually suffers pain or just says he does?

A. Why certainly.

Q. How do you know he suffers pain?

A. If a man limps and limps every step he takes and never forgets to limp is a pretty good sign he is suffering pain, and I have never seen Lewis taking a step but what he limps. I have seen him walk here in the court room (121). That is the way he always walks. I have never seen him walk any faster than here in the court room since he was injured. When he goes up steps he takes his right foot up, then puts his left foot on the same step, then goes up with his right foot, then up with his left, and he goes down the same way.

Q. In your opinion can he do it in any other way?

A. Well, it would be very painful to him if he did and laborious.

Q. Did you ever see him get in or out of an automobile since he was injured?

A. Yes.

Q. How does he get in?

A. He clamors in; he doesn't get in gracefully (122).

Recross examination.

By Mr. Becker:

I don't think there is anything the matter with Mr. Stoner's head, right arm, right shoulder, collar bone, eyes, any part of his head or neck, the back part of his shoulder, his left upper forearm, his lower left forearm, his right hand or right wrist, the bony structure of his hip and his spine, his right thigh, his left thigh, his right ankle, his

[fol. 66] right lower leg, his right foot, his left thigh. The only injury he has to any part of the bony structure is to his left ankle (123-124).

The testimony of Dr. F. Gregg Thompson, Jr., which was given on behalf of the New York Life Insurance Company in the suit brought by Lewis K. Stoner against that company and tried in 1934 in the Circuit Court of Buchanan County, Missouri, which was read in the trial of the case of Lewis K. Stoner vs. New York Life Insurance Company at the trial in Daviess County, Missouri on May 25, 1937 on the part of the New York Life Insurance Company by agreement of parties and as shown in the transcript of the evidence taken in that case is as follows:

I am and have been for twenty years a practicing physician and surgeon at St. Joseph, Missouri. At the request of Mr. Boyle Clark, one of the attorneys for the Insurance Company, I made an examination of Lewis Stoner at my office on May 29, 1934 of his lower left leg, ankle and left foot. Stoner stated to me he had no complaint from his injury except that at that time. Omitting all subjective symptoms the examination of his left leg and ankle of the foot showed the lower left leg in the region of the ankle to be swollen three-fourths of an inch larger on a level with the internal malleolus, this promontory on the ankle bone. It was three-fourths of an inch larger than on the other leg. He also had stiffness at the ankle joint so that the ankle joint was immobile, complete ankylosis (190-191). That is a term that is used when the ankle joint has become calcified and stoney-like so it does not move. In certain types of injury, and this was one type, the result sometimes occurs that on the bone you have calcium laid down in the joint between the joint surfaces. In this case between the tibia and the astragalus, which are two bones of the lower legs, the astragalus being the connecting bone between the foot and the lower leg. It is the short bone at the superior and middle part of the tarsus where it is articulated with the tibia, the first bone of the foot; and the joint is formed between the tibia and the astragalus. Calcium is one of the metallic elements of a light yellow color, the base of lime, and it has a substance which makes the bones hard, and the form in [fol. 67] which it is laid down usually causes calcium hard-

ness. There was swelling and ankylosis, or stiffness of the ankle. Then there was a scar on the anterior surface of the extreme lower end of the left (191) tibia, due apparently to a former break in the skin, probably at the time of this accident, and this scar had healed. My final conclusion and diagnosis of Mr. Stoner's left ankle at the time was that he has stiffness of the ankle joint. It is completely stiff. No motion in that joint. There is some swelling in the ankle joint and when he walks he probably has some limp because of that stiffness in the joint. He cannot bend his foot and ankle.

Q. Doctor, basing your opinion upon your examination of what you found at the time you examined this man, the objective symptoms alone, I will ask you whether or not, in your opinion, Mr. Stoner, suffers any pain by bearing his own weight on it when walking?

A. Yes, I think with the injury he has he has pain as he walks. That will probably disappear as time goes on and he will probably have pain when the weather changes. When the barometer goes up and down you have pain in that type of ankle for the simple reason that the periosteum is influenced by the pressure of the air. Anyone has pain after a break or dislocation of the joint. (192)

Q. That is common to any member of the body?

A. Yes.

Q. There is nothing peculiar to this fracture in that regard that you know of?

A. No, sir.

Q. I will ask you whether or not in your opinion based upon your examination of Mr. Stoner he is able to walk upon ordinary level surfaces without any great discomfort.

A. With that type of injury he is or should be able to walk on level surfaces.

(Narrative). In my opinion Mr. Stoner is able to drive a car and ride horseback. Phlebitis is a calcium deposit in the veins due to a change in the venous wall which may be due to certain diseases, or may be due to various other things, or may be due to an injury. Usually it is not painful except in case of acute phlebitis, and that is subject to medical treatment (193).

[fol. 68] Q. Can you state in your opinion whether or not the pain which occurs to Mr. Stoner, that is likely to occur from pressure, whether or not that is permanent?

A. It usually occurs for a period of years, sometimes a long time, sometimes not so long, but probably it will occur for several years to come. He probably will suffer for several years.

(Narrative) I was furnished with an X-ray examination made by Dr. McGlothlan and I saw the X-ray. From my examination and the X-ray, Mr. Stoner had a fracture of the interior malleolus. That is where the bone of the leg and the bone of the foot meet to make the ankle joint. There was a soft deposit fracture of the astragalus. The leg bones were not fractured. There was dislocation of the joint between the astragalus and the leg bone. This dislocation had been reduced and the laying down of calcium had taken place so as to make a solid mass in that joint.

Q. What is your opinion as to whether or not Mr. Stoner, with a little exercise, will be able or was able to get around without great discomfort on an ordinary level surface when he is walking?

A. Yes, sir, I think he can.

Q. On a very rough surface, what would be your opinion of his ability to get around?

A. It is more difficult for him to walk on a rough surface because his ankle does not move to accommodate itself to this surface. He cannot bend his ankle but would have to turn his whole leg out. That would cause a greater limp.

Cross-examination:

Mr. Stoner's condition is permanent. He has no movable ankle and he cannot use it. So far as moving that ankle is concerned it is just the same as if he had a foot and leg attached and never had had an ankle. I think the purchasing power in the toe and muscles going to it would not be influenced by this condition. I don't think [is] big toe drags greatly. I thought the motion of his toe was normal (195). I have not seen his foot since May 29 and then only when he came to my office for an examination which lasted from a half hour to an hour. I saw the report of Dr. McGloghlan [fol. 69] and the X-ray and from it Mr. Stoner had some phlebitis.

Q. Just to refresh your memory, doctor, by looking at the X-ray report: "There is rather pronounced, generalized, decalcification of the lower end of the tibia and fibula of the bones of the foot. This is a natural result of disuse.

Some of the veins of the leg show small phleboliths." That is right, is it?

A. Yes, sir, and that is what I saw in the X-ray.

Q. This man suffers pain. What causes the pain?

A. Because he has disturbance of the periosteum over the joint surface, not phlebitis.

Q. He has pain all the same?

A. Yes. That is, he said he had pain. I took his word for it. That is a subjective symptom and I had to take his word for it. (196)

Q. Just state from what you saw yourself, doctor, and your examination of the X-ray if in your opinion it would be reasonable that a man would suffer pain.

A. My opinion, yes, sir. He can walk on a surface like this floor in this room with a limp.

Q. And he walks very slowly?

A. I think he could walk faster.

Q. You think he could get up on these steps without any difficulty?

A. He would have some limp going up and down steps because he cannot use the ankle joint.

Q. You don't think he would walk around any considerable period of time without difficulty over a farm, do you?

A. Of course, that depends upon the time of injury. I think he can walk as well as a man would ordinarily on a farm.

Q. When you made the examination what did you think?

A. In my opinion he can walk an ordinary distance of say two miles.

Q. Over a rough field?

A. No, I didn't say a rough field.

Q. Could he walk on a floor like this?

A. On rough surfaces he would have difficulty in walking. (197)

Q. Would phlebitis cause this foot to be cold?

A. That would depend on whether the vein was completely obstructed. In complete obstruction it would be [fol. 70] cold, but phlebitis does not include an obstructed vein.

Q. Phlebitis is an obstruction of the vein by the formation of calcium?

A. It is only a partial obstruction in his case in my opinion. (198)

Redirect examination:

Q. Has he suffered any more from the fracture he received than from an ordinary facture?

A. I think he has suffered more because he also had a dislocation.

Q. I mean from the fracture itself?

A. Yes, sir, he had both a fracture and a dislocation (198-199).

The testimony of Dr. Charles T. Settles, contained in the abstract of the record in Stoner vs. New York Life Insurance Company, tried in the Daviess County Circuit Court, called by the Insurance Company as a witness in that case, was introduced in evidence and is as follows:

I am a physician practicing in Atchison County, Missouri. I have practiced for 37 years. I am one of the medical examiners for the New York Life Insurance Company in that county and in Mr. Stoner's case, I was to make examinations of him from time to time for the Company. I made maybe six, maybe ten examinations, two or three times a year for a couple of years, or maybe three years, and furnished my report of these examinations to the company at its request, and I was paid my fee by it. (200-201). The last time I examined Mr. Stoner was a few months before November, 1934. I first examined him when he was still using at least one crutch. All I examined was the foot, the ankle. Leaving out any subjective symptoms or complaints, I found some scar in the ankle, which was somewhat enlarged, swollen and ankylosed, or what you would term a stiff ankle. That was about all that was visible. The scar was evidence there had previously been an open wound which had been healed for some time. Following an injury to a joint, especially an open joint, open wound, fracture as this was, you frequently have an infection, and infection results in a deposit of lime or calcium in the joint, calcifies, or [fol. 71] really you might say, cements the joint at the bones that form the joint, cements them into one piece or one bone and that makes the ankle stiff. At the time I examined Mr. Stoner the last time, he was not able to move his ankle to any appreciable degree. It was practically stiff and in my opinion that condition of immobility is reasonably certain to be permanent. (202) In my opinion, at that time

Mr. Stoner could walk around over ground that was not rough, or drive an automobile or ride horseback—I don't mean broncho-busting—but I mean ride horseback.

Q. Now with reference to doing strenuous physical labor on the farm, such as plowing. I wish you would state whether or not, in your opinion, Mr. Stoner in 1934 would be able to do that sort of work?

A. Not if it required walking.

Q. Walking through the rough ground?

A. Yes.

Q. And in 1934, what effect would continuous use of his ankle for a long period of time, bearing his weight on it, have on him with reference to causing him some pain?

A. I think it would quite likely cause pain. I have not had occasion to examine Mr. Stoner since 1934.

Cross-examination:

The first time I saw Mr. Stoner was when he was using one or two crutches. From then I examined him two or three times a year, five to ten times all together, for the New York Life Insurance Company to keep them advised as to his condition, whether he was disabled and to what extent, and each time I reported to the Company his condition as I found it. I examined him when he had discarded his crutch and was walking on one cane, at least once, and reported that condition to the Company. When I did examine him, his foot and leg were as stiff and solid as if there had never been an ankle joint; and my recollection is that in 1933 and 1934 he was walking with one cane. Every time I have seen him since, he was walking in the same way with a cane and with a limp, just as he walks in this court room. In my opinion, he does not put on that walk or limp. As to the stiffness of the joint, it is the same today as when I examined him and his ability to use it or work it is practically the same and always will be.

[fol. 72] I was raised on a farm and I know what the usual duties of a farmer are. (208).

Mr. Phillip: You know that a man running a farm or farming, operating it himself and working on it himself as a farmer that the substantial duties of a farmer among others are plowing, sowing, planting, cultivating and harvesting crops, you know that?

Mr. Becker: Just a moment. We object to that as calling for a conclusion of the witness; invades the province of the jury; just not limited to the facts of this particular case, the activities which this particular man engaged in but rather refers the Doctor to his experience when he was a boy on the farm.

The Court: Overruled.

A. That's right.

Q. And if he operates his farm by buying cattle or livestock and feeding what he raises to that stock, you know that feeding of livestock is a part that is also the substantial duty of a farmer, isn't it, such a farmer engaged in that kind of operation?

Mr. Becker: Renew the objection heretofore made. Be understood it goes to all this line of questioning I won't interrupt any more.

The Court: Overruled.

A. It is.

Mr. Phillip: You know the customary way a man plows?

A. I have seen men sit on a plow, ride, I believe he could plow that way.

Q. How long could he do that kind of work, in your opinion?

A. I wouldn't say. I think some of those joints that are stiff are not painful. Some men with an injury of that kind might plow all day.

Q. Where are they painful?

A. It would just be up to a man's endurance.

Q. Might be half an hour, according to his endurance?

A. That's riding.

Q. Now how about walking and plowing?

[fol. 73] A. Well, I think walking and plowing with a stiff joint, I would say he would do mighty little of that.

Q. How about harvesting crops?

A. Well, he would be seriously handicapped.

Q. He couldn't do that like a man ordinarily does?

A. He couldn't do it to that extent, I would say.

Q. And he never will be able to do it?

A. No.

Q. He will never be able to do anything physically that

he could do today in your opinion on account of that stiff ankle?

A. No, I would say——

Q. (Interrupting) Whatever his condition is and whatever his ability for doing physical work today is, is what it will always be?

A. I would think so. (214)

Mr. Phillip: Well, at the time you last examined him, what would you say as to whether or not he could?

A. As to whether or not he could—repeat the last part of the question.

Q. Whether or not he could do the ordinary, substantial work of a farmer?

A. Not all of them.

Q. When you testified in this case in 1934, was this question asked you and did you make this answer: "Q. Any way he can not do the ordinary substantial work of a farmer, is that right? A. No, sir." Did you say that then, doctor?

A. I must have.

Mr. Phillip: Well, when you testified to that, you testified to the truth as you saw it?

A. That would be my intention. (217)

The foregoing is all the testimony offered by plaintiff.

MOTION OF DEFENDANT TO REFUSE DECLARATORY JUDGMENT

At the close of plaintiff's testimony, the defendant, in writing, moved the court to refuse the declaratory judgment prayed for by the plaintiff for the following reasons:

"1. Because the testimony offered by him shows upon its face that the defendant Lewis K. Stoner was totally and presumably permanently disabled from the time of [fol. 74] the accident up to the trial of this case within the meaning of those words as used in the policies and under the law of this case.

"2. Because it is alleged in the petition and denied in the answer that there is any controversy between plaintiff and the defendant with reference to the $790.70 premium that was paid by Mr. Stoner to the plaintiff and the Answer

alleges and it is not denied that the payment was voluntary, that Mr. Stoner never demanded and does not demand or contend that he is entitled to any return of any of that premium and that there is not and never has been any controversy between him and the plaintiff with reference to his right to recover any of those premiums and that the amount involved excluding that sum is less than $3,000.00; that there is no evidence in support of the allegation of the petition that Mr. Stoner has demanded these payments of premium back or that there is any controversy between the plaintiff and defendant with respect to the repayment or the right to recover those payments.

"3. Because it appears from the pleadings in this case that at the time this suit was brought there were pending in the state court three suits, each of which was brought by the defendant against the plaintiff on the identical policies involved in this action to recover disability benefits for a period, subsequent to September 29, 1936, and it is alleged in the petition that the defendant recovered and was not totally disabled within the meaning of the policy after September 29, 1936, so that the determination of any one of those cases and the proof of the fact alleged by the plaintiff will necessarily preclude any recovery in any of the cases pending in the state court or the recovery of disability benefits from May 29, 1936, to January 7, 1938, and the state court having first taken jurisdiction of the issue which is the only issue between the parties this court in its discretion should refuse to exercise its jurisdiction in this matter, even if the amount involved gives jurisdiction to the court."

The Court took the motion under submission.

[fol. 75] Thereupon the defendant, to sustain the issues in his behalf, offered the following evidence:

Defendant offered as a statement against interest the following statement appearing in the plea in abatement and amended answer filed by the plaintiff in this cause in the suit of Lewis K. Stoner vs. New York Life Insurance Company, a corporation, tried in the Circuit Court of Davies County, Missouri, to-wit:

"That the injury and disability of plaintiff and has been since September 29, 1933, permanent and fixed in character

consisting of a previously fractured and now stiff and immobilized ankle, the controversy in each case being the extent of the injury and disability, if any, and the making of due proof thereof."

The defendant thereupon offered the following evidence taken from the printed Abstract of the Record filed in the Kansas City Court of Appeals on appeal in the case of Lewis K. Stoner vs. New York Life Insurance Company, a corporation, filed in the Circuit Court of Buchanan County, Missouri, and the deposition of the defendant Stoner taken by the plaintiff in the instant case, to-wit:

The defendant thereupon offered in evidence the deposition of Lewis K. Stoner, taken by the plaintiff in the instant case a few days before the trial of this cause, which said deposition is as follows, to-wit:

Deposition of Lewis K. Stoner

Direct examination:

By Mr. Clark:

"Mr. Clark: I don't see that I could serve any useful purpose in going into the condition of Mr. Stoner prior to the trial of the case at Gallatin, so I shall confine my examination to his physical condition since that date."

The Witness: I remember the trial at Gallatin where I testified as to the nature of my injuries and my condition at that time and that I had a stiff ankle. My physical condition has changed since that trial in that my leg has gotten smaller. There has been no other change. A few days ago I consulted Dr. Harold J. Ryan in St. Joseph which was the only time I saw him. He just made an examination. I [fol. 76] cannot say whether I was examined for the purpose of the doctor testifying in this trial.

"Mr. Kaufmann: I will say this for the record. He was examined because we suggested that we have a competent nerve specialist examine him."

Mr. Clark: Is Dr. Ryan a nerve specialist?

A. Yes, sir.

Q. Are you still operating these farms?

A. Well, living on the farms. I am still handling them about the same way I was when I testified at Gallatin.

Q. Are you still buying and selling cattle and raising crops,—I don't mean personally, but I mean still buying and selling cattle and supervising the raising of crops the same as you were?

A. The same as I was when I testified at Gallatin. The condition in that regard has not changed a bit.

The only change I have noticed is that my leg has gotten smaller. It pains me now under any usable conditions. When I use it especially. I have pain at all times and when I use it the pain is worse. It seems to have gotten worse since the trial at Gallatin. At least it is not any better than when the case was tried at Gallatin. I can use my leg about the same now as I could then. It is the upper part of the leg which has gotten smaller, between the ankle and the knee above. I still walk with a cane. I get around about the same as I did when I testified at Gallatin and have about the same pain, but the leg is smaller. I first noticed it was smaller by looking at it. I have not measured it except with my hands. The doctor measured it but I don't know how much difference he found. There was an appreciable amount. It looks like there might have been two or three inches difference above the knee. That is merely my opinion and not the doctor's statement.

Cross-examination.

By Mr. Kaufmann:

Q. Mr. Stoner, Mr. Clark asked you about managing and operating your farm, what you meant to say, or what you mean is that you are handling that business the same as you were when you testified at Gallatin.

A. Yes.

[fol. 77] (Narrative) I am not taking any other steps or doing any more work than I did then. I am not able to do any more than I was when I testified at Gallatin.

Q. What you mean to say, as I understand it, is that in the management and in the performance of, or in the operation of those farms you tell someone what to do, just as you testified at Gallatin?

A. Yes, sir.

(Narrative) The injury which I had has never gotten any better since then but since the trial at Gallatin I have noticed

that my leg has been getting smaller. Dr. Ryan examined me but I do not know the technical results of his examination.

Q. This pain you described to Mr. Clark, you say you have constant pain in your leg.

A. Yes, sir.

(Narrative) Whenever I do anything with my leg it gets worse. As I sit here in this room I have pain and when I get on my feet with the aid of my cane and start to walking, that pain increases. When I am on it for some time and walk a block or two blocks that pain gets so bad I can't go any farther and I have to get off that foot or leg. The foot or leg starts to swelling, and whether I described my condition in those words at Gallatin, that was the condition at the time of the trial in Gallatin. In driving a car if I drive it for any length of time that pain gets worse. As I drive and use my leg and after I drive a short while the pain gets so bad I have to quit driving, and it is then when the leg starts swelling. I cannot now walk without the aid of a cane.

Q. Could you walk four blocks with the cane, just walk right off, as you walked in this office a few minutes ago, can you take that cane and walk four blocks without having such severe [paid] it would be almost unbearable?

A. It would be almost unbearable.

Q. What would you do if you had to walk four blocks?

A. I would sit down and maybe go on later.

Q. After you sit down for a while would your leg swell or start to swell?

A. My foot swells.

[fol. 78] Q. When you are on it a while?

A. Yes.

(Narrative) It swells so badly that I loosen my shoe lots of times. At nights if I have been on my feet or walked any short distance or driven a car or anything of that sort I don't sleep.

Q. Is that condition the same now as it was; has it gotten any better at all?

A. Hasn't gotten any better.

(Narrative) If I use that leg at all during the day I am unable to rest at night because I have such severe pain at night.

Q. Is your condition any different now than it was before, for instance, if you wanted to buy cattle, can you go down in the pen and inspect them and do the work which a cattle buyer would have to do?

A. Before my injury?

[A.] Since, now.

A. No, sir.

Q. Have you been able to since the trial at Gallatin?

A. No.

Q. Or were you before the trial at Gallatin and since the injury?

A. No.

Redirect examination.

By Mr. Clark:

Q. In other words, Mr. Stoner, from listening to you detail your condition in answer to Mr. Kaufmann's question, I understand you to say that your condition now, your handicaps are just the same as they were at the time you testified at the trial at Gallatin.

A. Yes.

Q. Outside of the shrinkage in the leg, no better or no worse, you are simply going ahead under the same handicaps that you were when you testified there at Gallatin?

A. Yes, sir.

Q. And the same amount of pain, and same amount of limitation in the use of your body in getting around, and things of that sort?

A. Yes, sir.

The defendant introduced in evidence the following testimony taken at the trial of the case of Lewis K. Stoner vs. [fol. 79] New York Life Insurance Company on the 12th day of November, 1934, in the Buchanan County Circuit Court as preserved in the abstract of record on appeal in that case to the Kansas City Court of Appeals. The part of the testimony of Lewis K. Stoner given on that trial not contained in the transcript of the testimony given in the case of Lewis K. Stoner vs. New York Life Insurance Company at the trial in the Daviess County Circuit Court on June 3, 1936, introduced by the plaintiff in the instant case, is as follows:

At the time of my injury I was a farmer. I have been a farmer all my life and never had any other occupation nor

did any other work. I never had any training or experience in any other line of work or profession and in my opinion I cannot follow any other profession. There is no other business of any kind that I can engage in that I know of and I have no qualification for anything outside of farming and never tried to pursue any other avocation to make a living. I know of no vocation that I could follow to make a living outside of farming (48-49). Up to the 29th day of June, 1931, I did all the chores on the place and everything there was to do on the farm, plowing, harvesting, making hay, cultivating the ground, I actually did all that and anything there was to do. I fed hogs and cattle and had hired men to help. One man could not do it all. I made improvements and repairs.

Q. What are the usual and ordinary duties of a farmer anyway and did you perform them at the time you took out the policies of insurance?

Objected to as calling for the conclusion of the witness, and for the further reason that the exact duties are stated in the application for insurance and no other duties are covered by the issues in this case. Stated court ruling: Overruled.

A. Well, I suppose we would start probably in the spring. There would be preparing the ground, planting, and cultivating, then harvesting, haying, threshing, gathering corn, repairing fences, feeding live stock, helping your neighbors on anything they wanted you to help with.

[fol. 80] (Narrative) I performed all of those duties before I was injured and none of them since. Since my injury I have not been able to do it and I have hired it done (50).

Q. You may describe in a general way,—not in detail, the condition of your foot, whether you can walk on it, whether you can do manual labor, what effect your foot has on your trying to do it. Just in a brief way.

A. I am scarcely able to do what you call walking. I get around. I don't get to go about the place, as one would need to oversee the stuff like that. It is very painful for me to try to get around.

Q. Can you get around on your farm?

A. I can just kind of get around and that is all. It is a labor for me to do so, to do what is easy for a person and

was always easy for me before I got hurt. That is the comparison as much as I can tell you. Before I was hurt I could do anything.

Q. Could you hire a man to go out in the field and see he did his work?

A. Yes, sir.

Q. Since your injury have you been able to go out on the farm to see that the men you have hired could do their work?

A. No. My accident did not affect me mentally. There never was a time I could not hire a man to do work or tell him what to do (51).

Q. Who, if anybody, does see your men do what they are hired to do?

A. It is up to them more or less.

I don't buy cattle myself. I used to buy them, went to market and bought them but now I get them through a commission man. He buys them and sends them to me. I don't see them before they are bought because I am unable on account of my foot to do it. I can drive a car but not over fields; lots of places it would be impossible for me to drive it. It is the jar. It takes more use of my foot than I am really able to stand. Trying to walk on my foot for any distance, driving a car for any distance, my foot swells and pains me and I have difficulty in sleeping at night if I am on my feet more than I should be. I cannot get in or out of my car without difficulty. I cannot manipulate or operate any kind of farm machinery since my injury (52). [fol. 81] I could do that before my accident and did so. I am interested in two farms, one owned by my brother and myself and one by my mother. I don't operate them. My brother, Ernest Stoner, rents my interest in one farm for one-fourth of the net proceeds. I have nothing to do with the operation of that farm. He operates it.

Q. Does he consult with you at times?

A. Yes, we might talk about it. Yes.

Q. Do you talk to your other brother and consult him?

A. Yes, sir.

Ernest operates the farm that he and I own together and has since my accident. There are two farms in which my mother has an interest. One is the farm where I live and the other is rented to a tenant. My mother and I get a

share of the crops. The bank usually draws the leases. I do not know how to draw a lease and never did draw one myself.

Q. Who agrees on the terms of the lease? Who talks about it?

A. Well it is more or less customary in certain localities that it should be for two-fifths.

Q. How often do you have to agree on the terms of a lease?

A. I don't know.

The repairs on the rented farms are done by the tenant. Before I was injured I helped with those repairs but I don't help now because I am not able on account of my foot and ankle. When a farm implement needs repairs the hired man does it.

Q. How do you know when it needs repairing?

A. The man tells me. That is the only way I have of knowing (54).

Q. How do you find out when the stock is ready to go to market or the crops are ready to go to market?

A. Well, I always ask the man how things are going, how the cattle or hogs or anything is doing and he tells me whether the stock is ready or not and I decide that. My injury has not affected my ability to decide when things should go to market. I do business with the bank.

Q. Do you do your banking business in your car?

[fol. 82] A. Yes, they know I have an injury and that it is hard for me to get around and they accommodate me in that way. They come out to the car and I transact my business in that way.

I can drive a car for a considerable distance, to Omaha or St. Joe (55). When I go my wife or my brothers drive. I had a fellow drive me down this morning. I can drive some, however, but it pains me to drive so far. When my stock is ready to be sold my men load it and I hire a trucker. Before I was injured I had a truck and hauled some myself, but since my injury I am not able to do it or help with it. I go to market and my wife or my brothers go with me. I have been out in the Yards some but practically not at all because I can't get out (in the yards) without walking. You can get out in the Yards but you can't see

much. I stay in the Stock Exchange building and whoever goes with me attends to the selling of the live stock.

Q. I believe you said you were not able to oversee or supervise the work done on your farm.

A. Yes, sir.

Q. Are you able to get a position as manager of a farm?

A. I wouldn't want to hire a man in my condition. (56)

Answer stricken out by State Court on request of defendant.

Q. Are you able to perform the duties of a manager who works on a farm?

A. No.

Q. Why?

A. A man needs to be more active than I am on his feet to do that work.

Q. To be employed as a manager of a farm what duties do you have to perform?

A. You have to see that the men do their work. I am not active enough to go around and inspect the work and suggest what is to be done (57).

I received the following letters from the New York Life Insurance Company, one dated October 26, 1934 and one dated ——:

[fol. 83] "New York Life Insurance Company
51 Madison Avenue, Madison Square
New York, N. Y.

Committee on Disability Claims
Frank S. Lantry, Chairman
J. N. Bell, Vice-Chairman

October 26, 1933.

Mr. Lewis K. Stoner, Watson, Missouri.

Claim #69 526-C
Pols. #9 961 0378
10 928 483-4

DEAR SIR:

Referring to the above numbered policies on your life on which policies monthly disability income payments have been made to September 29, 1933, inclusive, it appears to the Company from information recently received, that you are

no longer continuously totally disabled within the meaning of the Disability Benefit Provision contained in the policies.

In view of this condition, we regret we find it necessary to say that no further monthly disability income payments will be made and the premiums hereafter due become payable in conformity with the terms of the policy contracts.

Yours very truly, Frank S. Lantry, Chairman R. F/lmb."

"New York Life Insurance Company
51 Madison Avenue, Madison Square
New York, N. Y.

Committee on Disability Claims
Frank S. Lantry, Chairman
J. N. Bell, Vice-Chairman

Mr. Lewis K. Stoner, R. F. D. #2, Watson, Mo.

Re: Pols. 9961 037-8
Claim #69 526-C

[fol. 84] DEAR SIR:

We refer you to our letter of November 27th, and wish to advise that the Company has now completed a further investigation with respect to your claim for the continuance of disability benefits.

The information recently received by the Company is a verification of the reports previously received, namely, that for some time past you have not been totally disabled. At the time the Company discontinued the payment of disability benefits it had before it information, received as a result of a careful investigation indicating that you are up and about, able to drive your car daily and supervise the work on your farm. Moreover, it was learned that you discarded your crutches and after using two canes for a while you are now able to get about with the aid of one cane.

Upon reviewing our records we note, at the time you applied for insurance, you listed your duties as an owner and manager of a farm. In view of the reports recently received it is evident that you are now performing the same work as when you took out the insurance.

Furthermore, it appeared from the report of our doctor's recent examination that you are no longer wholly disabled but able to supervise the work on the farm and pursue other

forms of remunerative endeavor. Although you may not be able to do general farm work, the Company in view of your reported activities, would not be justified in considering that you are any longer totally disabled and prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, as stipulated in the Disability Benefit Provision contained in the policies.

We have again reviewed the file on the case but in view of the circumstances find it necessary to adhere to our original decision, discontinuing the payment of disability benefits.

Very truly yours, Frank S. Lantry, Chairman."

[fol. 85] Testimony of Dr. H. J. Ryan:

Dr. H. J. Ryan, offered as a witness by defendant, testified that he was a physician, a graduate of the St. Louis University School of Medicine, and had been practicing nine years; that he served an interneship in St. Louis for approximately two years, and a fellowship at the Mayo Clinic for nearly three years; that he was a member of the Buchanan County Medical Society, the Nodaway County Medical Society, the Missouri State Medical Association, American Medical Association, Southern Medical Association, Association of Resident and Ex-resident Physicians of the Mayo Clinic, and the American College of Surgery; that he practiced in St. Joseph, and practiced three days a week in Maryville; that he specialized in neurological surgery; that he was connected with the hospitals in St. Joseph and did neurological surgery at Menninger Clinic, Topeka; that at the request of counsel, he examined Lewis K. Stoner on Friday of last week, making a thorough examination; that he tested his superficial and deep reflexes; his reaction to electrical stimulation, both galvanic and sporadic current; made an inspection and manipulation of his leg and thighs and feet, and obtained a personal history from Mr. Stoner.

The historical facts as given him and as recalled by him were that Stoner had an injury several years ago, probably in 1931, and was confined to the hospital for a period of several weeks; that he went about on crutches for, he believed, a period of two years, and since that time had gone about with the aid of a cane; that the patient complained of

his foot, ankle and leg, and that the pain was exaggerated by exercise; that he complained of swelling of his foot, ankle and leg, coldness in his foot, ankle and leg, and fixation of his ankle joint.

He testified that he made the following objective findings: that by inspection he noticed that the left leg, the injured one, is pale, is cold to the touch, and there is a stellate scar on the front and side of the ankle joint; that there is another scar inside the leg, about eight or ten centimeters above the inside of his ankle; that on attempted movement of the ankle joint it is fixed, and that the left leg is considerably [fol. 86] smaller than the right, and that the muscles are flabby to palpation; that he did not recall anything else.

The witness testified that he anticipated from inspection and from the looks of the foot and leg that the patient suffered pain; that the objective symptom indicating pain was the color, indicating that there was a blood vessel arterial spasm, that is, there is evidence of an old phlebitis; that was about all that indicated pain; that there was a progressive atrophy of the leg, how far it would progress he did not know; that he had only seen the man once and could not predict what the extent of the atrophy would be; that it was his opinion that the injury was the cause of the atrophied condition.

The doctof further testified that in expressing his opinion, he was answering the questions from his own examination; that the ankylosis, or the fixation of any joint any place in the body, always results in atrophy of the muscles or groups of muscles that are in the neighborhood of that joint, and act upon it or those that derive their nerve supply from the area that might possibly have been injured; that there were subjective signs of injury which, in the opinion of the witness, affected the nerves and muscles of parts of the foot.

In explanation, he stated that his left foot was 1½ centimeters smaller than the right, that is, measuring that part of the foot over the base of the toes; that the foot was in extension, and the degree of extension was estimated to be three centimeters at the heel; that is, he fails to put his heel on a flat surface by three centimeters; that that condition is due to the fact that he has paralysis of his anterior and posterior tibial nerves; the anterior tibial nerves supply the muscles that tip the toe upward, and the posterior tibial supplies the major portion of those muscles that are in the calf of the leg; that when paralysis of those two occur simul-

taneously, the muscles that make up the calf are much stronger than the ones on the anterior surface of the leg, and therefore the antagonistic action that both have is neutralized and the foot naturally draws up toward the more powerful and heavier muscular side; that he obtained the impression from examining the man that the bony fixation of his ankle joint was permanent, and if so, he knew of no method of treatment that would correct it.

[fol. 87] Testifying further, he stated that at a distance of nine centimeters above the lateral malleolus, that is, the lateral part of the ankle joint, the left leg measured 24½ centimeters and the right leg measured 25 centimeters; that in that region, there are no muscle fibers, only tendons are located there; on the front side of the ankle, the scar mentioned measured 10 centimeters by 6 centimeters, is a stellate fixed adherent scar, and there is also a scar on the lateral surface of the leg, higher up; that in that region the atrophy is the least because there are no muscle fibers located in that region; that about 10 centimeters below the spine of the tibia, which makes that measurement up about the center of the fleshy part of the calf, there is a difference of 2 centimeters; that that measurement was taken below the knee; that 14 centimeters above that point, the spine of the tibia, there is a difference of 5 centimeters in the circumference of the thigh; that these conditions related would cause the foot to swell in event the patient was on it any length of time or used it; that this swelling is caused because he has a residual phlebitis, the revenous return in his foot, ankle and leg is incompetent; that by exercise, you would expect an increase in the metabolism of the muscle, therefore an extra demand on the arterial circulation, and when the arterial circulation is in a state of constant spasm, as careful inspection will tell you by looking at this man's leg, you immediately know that pain will be produced, which by name is called intermittent claudication; that in this diagnosis, whether or not he was told the patient suffered constant or exaggerated pain was immaterial to the witness in making his diagnosis; that he did find from examination objective cause for the patient having constant pain, because the sympathetic nerve fibers that control the site of the blood vessels are the pain carrying fibers that arise in the blood vessels themselves and they are being constantly stimulated; that from the condition he found upon his examination the witness believed that Stoner would suf-

fer constant pain; that to be upon his leg or walk any distance or use his leg which required physical effort would cause it to swell, which would increase the pain until the swelling became marked enough that anesthesia would result from the pressure; that Stoner had anesthesia along the top of his foot distal to the location of the scar; that the [fol. 88] witness believed that Stoner could walk without a cane; that if he walked without a cane he would not suffer any particular pain, but that he would develop a pain as he walked, which would increase in intensity and severity, and if prolonged for an indefinite period he would develop a dry gangrene; that by that he meant he would have trophic ulcers on the end of his toe as a result of a reduction in blood supply; that dry gangrene is the result of a complete loss of the arterial supply to a part of the body; that he presumed it was advisable for Stoner to use a cane; he did not know how well he could get around without one; that from his examination he would say it was not a proper thing for Stoner to do any work that required physical effort because it would increase his pain and decrease his arterial supply to his foot; that the effect upon his general physical condition would depend entirely upon his irritability to pain; that assuming that if he is on his foot any length of time or driving his automobile any distance or does any effort on his foot it swells and when that occurs he suffers pain, and from his examination of the man, he did not believe he was physically able to perform any manual labor involving the use of his foot; that in the interest of his health and well being he thought it would be proper advice for any doctor to advise him to remain off his foot as much as possible, and his opinion was that Mr. Stoner should remain off his feet as much as he can.

By Mr. Kaufmann:

Q. Doctor, are you personally familiar with the work that is ordinarily done by a farmer in operating his own farm or renting a farm?

A. I am.

Q. From your own personal knowledge then of the duties that the average farmer performs in and about his farm in operating a farm as a farmer would do who owns his own farm——

Mr. Brown (Interrupting): We object to that as calling for a conclusion of fact with which the doctor is not familiar.

The Court: I would not think you would need to give much time to that, Mr. Kaufmann. Mr. Clark stated in his opening statement that this man was unable to do physical work, on a farm.

[fol. 89] Cross-examination:

On cross-examination, the doctor testified that he had seen Mr. Stoner on only one occasion; that he did not have the benefit of x-ray pictures, and that the testimony he had given was based upon one examination, made without the benefit of x-ray reports; that he found Mr. Stoner suffering from what is commonly known as an ankylosed left ankle, that in his opinion the joint is immobile; that in such cases the joint is stronger; that as far as his ability to bear weight upon the leg is concerned, the bone is as satisfactory as it was before the date of the accident, providing the force of the thrust is the same as it is in an ankle in the anatomical position, that is in the weight bearing position; that as far as the bone itself is concerned, there is no pain attendant upon using an ankylosed ankle; that there are many people who go about in ordinary walks of life, performing their ordinary duties, who have ankylosed ankles or other ankylosed joints; that the injury he described as disabling in character, is an injury to other parts of surrounding tissue adjacent to the ankle; when you have an injury with sufficient trauma to dislocate and fracture an ankle, you are bound to have considerable trauma and considerable injury to the surrounding soft tissues; that the proper treatment is non use; that the natural consequences of immobilization of a member is reduction in size of the surrounding soft parts, due to non-use; that the proper treatment to correct that condition is use of the injured member as soon as that use is permissible in view of the other conditions of the patient,—provided the nerve supply has not been injured; that a part of Stoner's complaints are due to an injury to nerve fibers of the sympathetic nervous system.

Q. Is it true, Doctor, that that condition could be corrected by a simple operation known as a sympathectomy?

A. The vasal spasm of the arteries in his entire leg could be completely corrected if that were done and if it is anatomically possible in this individual that all of his sympathetic fibres are located in his sympathetic trunk in his pelvis. Should there be any fibers in his cord it would be

necessary to section a portion of his cord on his right side to interrupt those pain car ying fibers.

[fol. 90] Q. In other words, the operation is an interruption of the pain carrying fibres?

A. Yes.

Q. It does not otherwise interfere with the use or movement of the leg?

A. A sympathectomy, that is removal of the gangria and their raine would not interfere with any movement or any sensation in his leg, I mean superficial sensation to touch.

Q. Now, leaving out of the question any injury to the sympathetic nervous system is it not true that the mere non-use of Mr. Stoner's left leg would result in the atrophy that you have found?

A. No, the atrophy is too extensive to blame it all on to non-use.

Q. The amount of atrophy depends upon the amount of use, does it not; that is a person who used his leg slightly would have [les] atrophy than a person who kept his leg absolutely immobile?

A. That is not constant because you can get atrophy from over use.

Q. You say that in this particular case, the case of Mr. Stoner that mere non-use of his left leg could cause some atrophy but you do not think as much atrophy as you found?

A. That is correct.

Q. And you think that the condition that you found is one which would have been produced in about eighteen months?

A. It would begin to be noticeable in about that period of time.

Q. Doctor, did this man give you a history that this condition had never been noticed by him or any doctor who examined him for more than six years after this accident?

A. I do not recall that he gave me that history but I am prepared to say that that atrophy has been there for a long time and I would say a matter [or] two or three or possibly four years; that it is impossible to have that much atrophy develop abruptly.

Q. You have spoken of an atrophy of various portions of the left leg commencing at the foot or ankle and extending to a point above the knee?

A. That is right.

[fol. 91] Q. You found no evidence of any trauma above the left ankle, did you?

A. There is a point, a scar on his leg that I mentioned, I think I said 9 centimeters above his ankle.

Q. Two and one-half inches would you say?

A. Yes, roughly.

Q. Above a point two and one-half inches higher than his left ankle there was no evidence of any trauma?

A. I saw none.

Q. No evidence then of any direct injury to the muscles or tendons or other soft parts above that point?

A. That is correct.

Q. I say in answering any question with regard to manual labor you do not mean that the condition of his left leg and ankle would prevent him from doing manual labor which did not necessitate their use?

A. That is correct.

Q. There is nothing to prevent this man from driving an automobile, is there?

A. It depends on how much he has to use his left foot.

Q. Well, do you know people that drive automobiles without the left foot at all, Doctor?

A. Yes, I do.

Q. Let me ask you this question, Doctor, if this man can drive an automobile and does drive an automobile is there any reason why he could not drive a tractor?

A. No particular reason other than the uncomfortable jiggling of the tractor; it is a rather [uncomfortagle] thing to ride; I don't know whether that hurts him or not.

Q. If this man has at the present time a mechanized farm where the old beasts of burden are not so frequently used, is there anything, if he can drive an automobile, which would prevent him from manipulating any of his mechanized equipment?

A. If he has a farm on which he uses all power driven implements?

Q. That is correct?

A. You want an expression from me as to whether he could be able to handle that farm?

Q. I am asking you if this man is able to and does drive an automobile and has for years after the date of this accident and if he has a farm that is mechanized and controlled [fol. 92] by power driven machines, is there any reason why he cannot operate them?

A. No, I would say not.

Q. Is there any reason why he cannot ride a horse?

A. Other than the fact that the swelling occurs when his foot is dependent, hangs down.

Q. Does the hanging down of the foot cause it to swell any more than when it is not hanging down?

A. Yes.

Q. When a man is sitting in a chair the foot is hanging down?

A. That is correct.

Q. Just the same as if you were seated on a horse?

A. That is right.

Q. So there would be no more pain caused by this dependent position, sitting on a horse than sitting in a chair?

A. That is right, with his knee in a normal sitting position.

Mr. Brown: That is all, Doctor.

Redirect examination.

By Mr. Kaufmann:

Q. Doctor, did you mean to say to Mr. Brown in answer to that question about machinery that he could use any kind of a machine that would require the use of his left leg to operate it, that is, where he had to use any force with his left leg to operate on the farm, could he, in your opinion do that kind of work with that leg?

A. I am not acquainted with all sorts of farm implements but I had in mind since the discussion came up about the ability to drive a tractor, he could get on a tractor and haul anything he wanted to, a plow or any of the other implements.

Q. You mean anything that did not require the use of his leg, the physical use of his leg, is that what you mean?

Mr. Brown: Objected to as leading.

The Court: Sustained as leading.

Q. I withdraw it. What I am trying to get at, Doctor, could he do any work with a machine of that kind that required any excessive use of his left leg, assuming the machine required the physical exercise of using his leg, could he do it or should he do it, in your opinion?

[fol. 93] A. Assuming, as Mr. Brown brought out, that the amount of use required did not exceed that of driving an automobile.

Q. Now, let me ask you this question. You may assume

that if he drives an automobile anything other than a short distance, if he drives it any other than a short distance that the foot hurts him severely and starts to swell and he has to stop driving, and causes him to stay awake at night, you may assume that to be true——

Mr. Brown: (Interrupting) May I interrupt to ask one question, is that evidence to be supplied?

Mr. Phillip: It is already in here.

Q. You may assume that is true, Doctor. What would you say as to whether or not he could operate a piece of farm machinery that required the use of his leg no more than to drive an automobile, what effect would that have on his leg assuming that to be true as I say that when he drives a car over a short distance his leg causes him pain and starts to swell?

Mr. Brown: If the Court please I object to that because I do not believe the facts stated in the question are in the record.

Mr. Kaufmann: In fairness to Mr. Brown, he was not present when the deposition was taken that was introduced.

The Court: We will assume it is there and if it is not you can correct it.

Q. What would you say would be the result upon him of trying to use farm machinery if the results were as I stated when he drives a car?

A. It would necessitate him stopping and waiting until such time as he recovered, his swelling recovered or his pain subsided.

Q. As I understand you, Doctor, it is your opinion that this man should not do anything requiring any physical effort with his leg, that requires the use of the leg in any physical effort?

Mr. Brown: Object to that as repetition.

[fol. 94] The Court: Sustained.

Mr. Kaufmann: That is all.

The foregoing is all the testimony offered by the defendant.

Upon the foregoing testimony offered by plaintiff and defendant, the cause, after argument by counsel, was submitted to the court.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUEST FOR CONCLUSIONS OF LAW—Filed September 26, 1938

Plaintiff requests the following conclusions of law:

I

The court declares the law to be that under the evidence in this case its findings must be for the plaintiff, and that defendant is not entitled to have the premiums on the policies in evidence waived from and after May 29, 1936, to January 7, 1938, and is not entitled to any total and permanent disability benefits payable thereunder during the period intervening between May 29, 1936 and January 7, 1938.

II

The court declares the law to be that if the defendant, during the period between May 29, 1936, and January 7, 1938, engaged in any business, followed any occupation or engaged in any business for remuneration or profit, then its finding should be for the plaintiff, and that the defendant is not entitled to have the premiums on the policies in evidence waived from and after May 29, 1936 to January 7, 1938, and he is not entitled to any total and permanent disability benefits payable thereunder during the period intervening between May 29, 1936 and January 7, 1938.

Respectfully submitted, H. Templeton Brown, Boyle G. Clark, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 95] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUEST FOR SPECIAL FINDINGS OF FACT—Filed September 26, 1938

Plaintiff requests the following special findings of fact:

I

The court finds as a fact that the defendant since September 29, 1933 in the supervision, control, management

and conduct of the operation of farms has been engaged in an occupation and business.

II

The court finds as a fact that defendant has since September 29, 1933 engaged in an occupation and business for remuneration and profit.

III

The court finds as a fact that since September 29, 1933 the defendant has not at all times been so disabled by bodily injury as to wholly prevent him from following any occupation or from engaging in any business for remuneration or profit.

IV

The court finds as a fact that defendant's disability was not at all times such after September 29, 1933 as to wholly prevent him from managing, supervising, controlling and directing the operations of farms for profit.

V

The court finds as a fact that from and after September 29, 1933 defendant supervised, controlled, managed and conducted the operation of farms for profit.

VI

The court finds as a fact that from and after September 29, 1933, the defendant, in the supervision, management and operation of farms, made a profit sufficient to realize a livelihood.

VII

The court finds as a fact that during the period from May 29, 1936, to January 7, 1938, the defendant had not been totally disabled, that is, so disabled by bodily injury [fol. 96] as to wholly prevent him from following any occupation or engaging in any business for remuneration or profit.

Respectfully submitted, H. Templeton Brown, Boyle G. Clark, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF PLAINTIFF FOR NEW TRIAL—Filed October 10, 1938

Comes now the plaintiff, New York Life Insurance Company, a corporation, and moves the Court to grant it a new trial for the following reasons:

1. The findings of fact made by the Court is not supported by [an] substantial evidence.

2. The Court erred in concluding as a matter of law that the plaintiff bore the burden of proving that the defendant was not totally disabled within the meaning of the policy of insurance involved.

3. Because the rule with reference to total disability applied by the Court in this case is contrary to the decisions of the Supreme Court of Missouri.

4. Because the rule with reference to total disability applied by the Court in this case is contrary to the decisions of the appellate courts of Missouri.

5. Because the rule with reference to total disability applied by the Court in this case is contrary to the decisions of the United States Circuit Court of Appeals.

6. Because the finding of the Court is contrary to the evidence.

7. Because the finding of the Court is contrary to the law.

8. Because the conclusion of law announced by the Court is contrary to the law.

9. Because in the informal finding of the Court contained in the memorandum preliminary to the formal conclusion of law and finding of fact, it is apparent that the judgment [fol. 97] of the Court is erroneous and that the plaintiff should be granted the declaration prayed for in its petition.

10. Because the Court erred in refusing plaintiff's requested conclusions of law I and II, and each of them.

11. Because the Court erred in refusing plaintiff's requested findings of fact, I, II, III, IV, V, VI and VII, and each of them.

Conclusion

Wherefore, the plaintiff prays, that pursuant to its motion, it be granted a new trial herein or that the Court open the judgment heretofore rendered herein, amend the finding of fact and conclusions of law, making new findings of fact and conclusions of law and amending the judgment in conformity therewith, so as to declare that the plaintiff is not liable to the defendant for total and presumably permanent disability from May 29th, 1936 until January 7, 1938, on the policy involved herein.

H. Templeton Brown, Clark, Boggs, Peterson and Becker, Howard B. Lang, Jr., Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Record Entry of Overruling of Motion for New Trial—November 7, 1938

Court in session, Judge Merrill E. Otis, presiding.

* * * * * * *

No. 2296

New York Life Insurance Company

vs.

Lewis K. Stoner

Motion for new trial overruled.

* * * * * * *

[fol. 98] In United States District Court

Memorandum Opinion, Findings and Conclusions, Declaratory Judgment—Filed October 1, 1938

The principal and perhaps the only real question in this case is this: Has the plaintiff proved that from May 29,

1936, defendant has not been "totally and presumably permanently disabled"?

The contracts [bewteen] the parties (policies of insurance) contain this definition—

"Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation or from engaging in any business for remuneration or profit, * * *."

Looking, for the present, only at this very plain and simple definition, we consider what are its several elements. What did the parties to this contract agree should be considered total disability? They agreed that disability should be considered total whenever the insured is—

1) disabled by bodily injury or disease

2) so that he is (a) wholly (b) prevented from performing (c) any work, or (cc) from following any occupation, or (ccc) from engaging in any business for remuneration or profit.

There is not a word or phrase in these contracts (unless we have overlooked it after a most careful search) which justifies or supports the contention that defendant was insured against being wholly prevented from following the occupation of farmer. To assert such a limitation of the definition is to defy the obvious meaning of the word any. No sensible construction of the definition in the contract could result in such a limitation. Moreover such a plain and simple word as the word "any" does not require nor permit construction.

That the three elements which we have designated in our analysis of the definition as (c), (cc) and (ccc) are alternatives is obvious. Any two of them may be omitted altogether. The sense of the definition still is complete. One is totally disabled when he is wholly prevented "from per- [fol. 99] forming any work." He is totally disabled when he is wholly prevented "from following any occupation." He is totally disabled when he is wholly prevented "from engaging in any business for remuneration or profit." Any insured person who can prove any one of these alternatives has proved total disability. Conversely, if any insurer can

prove that an insured is not wholly prevented "from doing any work", or that he is not wholly prevented "from following any occupation", or that he is not wholly prevented "from engaging in any business for remuneration or profit", then the insurer is under no liability.

Now plaintiff's learned counsel frankly, in effect, has confessed, that he cannot prove that defendant is not wholly prevented "from doing any work." *

On the contrary he admits that there are many types of work (every type indeed requiring the continuous and free use of defendant's injured foot) which he cannot do. Plaintiff has admitted that its burden is to prove either the second or the third alternative. Has plaintiff proved either?

For some reason (doubtless because his testimony, as given in other trials and as given also in a deposition, was before the court) the defendant did not take the witness stand. He was in court, however, (he walked in during the progress of the trial) and we observed him carefully. (It is knowledge made famous by the oft repeated tale that one can obtain a much clearer comprehension of the appearance and nature of an elephant by seeing one than by hearing the learned descriptions of even four eminent men of science). We observed the defendant carefully. He walked into the courtroom, using a cane, but with only a slight limp, and with no expressions of pain. He appeared to be a strong, vigorous, healthy man, whose manner, features and appearance suggested intelligence above that of the average farmer. We have considered all of the testimony with the [fol. 100] aid of this personal, visual, greatly significant observation.

The whole truth of the matter is that as a result of his injury the defendant has a permanently stiffened ankle; that any extensive use of that ankle is now painful, so that it cannot be extensively used both because of the pain and because of the stiffness; that medical and surgical treat-

* It would be most erroneous to contend, and no one has contended, that when it has been proved that an insured is capable of doing some work, the converse of the first alternative has been proved. That converse of the first alternative only will be proved when it is proved that the insured is not wholly prevented from performing any work.

ment possibly would remove entirely the pain element in the defendant's ankle condition. The only business in which the defendant has had training and experience is that of farming. He is not physically able, because of his injury and its consequences, to perform those farmer's tasks which require the more or less continuous and full use of both feet. That is the extent of his handicap.

Now that one of the three alternatives which the plaintiff in this case should choose to attempt to prove is the third alternative. If the plaintiff cannot prove the third alternative it certainly cannot prove the second (which really involves the third). Has the plaintiff then proved that the defendant is not "wholly prevented * * * from engaging in any business for remuneration or profit?"

Here are words which do require interpretation. What is meant by "business"? We would say that by that word is meant any one of those vocations in life whereby men have been accustomed to earn livelihoods for themselves and their families. Certainly, in that sense, selling shoestrings on the street corner is not a "business". What is meant by "remuneration or profit"? Undoubtedly those words, when used in connection with the words preceding them, contemplate some measure of remuneration or profit. What measure? We should say, that measure of remuneration or profit to which he who pursues any of the usual vocations of life expects to receive. The word, "wholly", in the phrase, "wholly prevented", only gives emphasis to the word "prevented". It is not enough that the insured shall be disinclined or unwilling to or discommoded by engaging in any business. He must be "prevented" from engaging in any business.

What "business for remuneration or profit" has it been proved this defendant can engage in? And it must be re- [fol. 101] membered that the plaintiff has put itself at a disadvantage by assuming the burden of proof, by seeking a declaratory judgment, by declining to be content with the right and privilege of defending. What "business for remuneration or profit" has it been proved this defendant, assuming he is without capital (and that assumption must be made) can engage in? Certainly the assumption that the defendant is without capital must be made. It is the insured (not the insured's money) that must be able to engage in business.

Conceivably the defendant, notwithstanding his handicap, might engage in several lines of business, other than farming, but plaintiff has not sought to prove that and that cannot be ruled in the light of judicial knowledge only. The plaintiff has been content with its theory that the defendant can engage "in the business of farming for remuneration or profit". We are convinced plaintiff has not sustained the burden, which plaintiff has assumed. It is not enough to prove that the defendant does make a living (if that has been proved) by adding his managerial skill to the ownership of one farm, the renting from his mother of another farm, and the ownership of power machinery. It certainly has not been proved that he alone, unaided and without special advantages, can engage "in the business of farming for remuneration or profit." No attempt has been made to prove anything of that kind. And it has not been proved that plaintiff would be employed for his managerial skill by any person.

Having reached the conclusion which we have stated we consider it unnecessary to determine what greater burden the Supreme Court of Missouri may have imposed on an insurance company writing a contract such as these involved in this case than that burden our interpretation imposes. We consider it unnecessary also to discuss further than we have discussed in other opinions in this case and elsewhere other questions raised by the defendant.

We summarize what we have said in one formal—

CONCLUSION OF LAW

To have a declaratory judgment that it is not liable on account of total and presumably permanent disability un- [fol. 102] der a policy of insurance such as are involved in this case an insurance company must prove by the preponderance or greater weight of the credible testimony that the insured can do any work; or that he can follow any occupation, that is, any of those occupations by which men earn livelihoods for themselves and their families, himself performing such of its duties as substantially constitute that occupation; or that he can engage in any business for remuneration or profit, that is, in any of those businesses by which men earn livelihoods for themselves and their families, himself performing such of its duties as substantially constitute that business.

We make this—

Finding of Fact

From May 29, 1936, until January 7, 1938, the defendant was totally and presumably permanently disabled by reason of the injury received by him June 29, 1931.

Exceptions Allowed

Plaintiff is allowed an exception to the conclusion of law herein announced, to the declaratory judgment hereinafter set out, and to the Court's refusal to make the Findings of Fact and to find the Conclusions of Law requested by Plaintiff.

Declaratory Judgment

The Court, having made findings of fact, having announced its conclusion of law, and having delivered its opinion in writing, it is found, adjudged and decreed—

1. That the plaintiff is liable to the defendant on its policies of insurance described in its petition for declaratory judgment for total and permanent disability benefits (including waiver of premiums) for the period beginning May 29, 1936 to January 7, 1938.

2. That the plaintiff pay the costs of this case.

Merrill E. Otis, District Judge.

[File endorsement omitted.]

In United States District Court

[fol. 103] Notice of Appeal to the Circuit Court of Appeals—Filed February 3, 1939

Notice is hereby given that New York Life Insurance Company, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this action on October 1, 1938.

Boyle G. Clark, Paul M. Peterson, Attorneys for Appellant, New York Life Insurance Company, a corporation, 317 Guitar Building, Columbia, Missouri.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT

To the Clerk of the United States District Court:

In the above-entitled cause on appeal, please include in the transcript of the record:

1. Petition.
2. Defendant's answer.
3. Plaintiff's reply.
4. Stipulation as to the record and agreed transcript of proceedings heretofore filed in this cause, including stipulation to waive the jury and providing for the introduction of evidence or documents contained in printed transcript of the record stated in said stipulation, and the exhibits and testimony set out in said agreed transcript and proceedings.

[fol. 104] 5. Plaintiff's request for conclusions of law, plaintiff's request for special findings of fact filed September 26, 1938.

6. Plaintiff's motion for new trial filed October 10, 1938.
7. Order overruling motion for new trial, dated November 7, 1938.
8. Memorandum opinion, findings and conclusion, declaratory judgment filed by the court, and judgment entered on the record.
9. Plaintiff's petition for appeal and record entry allowing appeal, and any other record entries.

Boyle G. Clark, Paul M. Peterson, Attorneys for Plaintiff. Ben Phillip, Attorney for Defendant.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA, ss:

I, A. L. Arnold, Clerk of the United States District Court for the Western District of Missouri, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and proceedings in the case of New York Life Insurance Company, a corporation, Plaintiff, vs. Lewis K. Stoner, Defendant, No. 2296, as are designated for inclusion by counsel, as fully as the same

remain on file and of record in my office, with the following exceptions:

Plaintiff's reply.
Plaintiff's petition for appeal.
Record entry allowing appeal.

there being no reply or petition for appeal on file in said case and no record entry allowing appeal.

In addition to proceedings designated by counsel and in compliance with Rule 75, Rules of Civil Procedure for the [fol. 105] District Courts of the United States I have included in the foregoing transcript the Demurrer, Order of Court overruling demurrer and Notice of Appeal.

I further certify that on February 4, 1939, I mailed a copy of the Notice of Appeal herein to counsel for party other than party taking the appeal in compliance with Rule 73, Rules of Civil Procedure for the District Courts of the United States.

I further certify that there is an appeal bond on file in this office in this case in amount of Two Hundred and Fifty Dollars ($250.00) wherein the New York Life Insurance Company, a corporation, is principal, and The American Surety Company of New York is surety.

In Witness Whereof, I hereunto subscribe my name as Clerk and affix the Seal of said Court.

Done at Office in St. Joseph, Missouri this 4th day of March, 1939.

A. L. Arnold, Clerk, by Richard S. Duncan, Deputy Clerk. Seal U. S. District Court. St. Joseph Div. Western Dist. Mo.

Filed Mar. 6, 1939, E. E. Koch, Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a Corporation, Appellant,

vs.

LEWIS K. STONER, Respondent

STATEMENT OF POINTS RELIED ON—Filed March 11, 1939

Now comes the New York Life Insurance Company, a corporation, Appellant herein, and files this, its Statement of Points Relied On, as follows:

1. The Court erred in making the finding of fact that from May 29, 193- until January 7, 1938, the defendant was totally and presumably permanently disabled, by [fol. 106] reason of the injury received by him June 29, 1931, because there was no evidence to support such a finding of fact.

2. The Court erred in making the conclusion of law that—

To have a declaratory judgment that it is not liable on account of total and presumably permanent disability under a policy of insurance such as are involved in this case an insurance company must prove by the preponderance or greater weight of the credible testimony that the insured can do any work; or that he can follow any occupation, that is, any of those occupations by which men [earl] livelihoods for themselves and their families, himself performing such of its duties as substantially constitute that occupation; or that he can engage in any business for remuneration or profit, that is, in any of those businesses by which men earn livelihoods for themselves and their families, himself performing such of its duties as substantially constitute that business.

because—(a) the conclusion of law erroneously cast the burden of proof upon the appellant; (b) it required proof on the part of the appellant to defeat recovery that the insured could do any work, which is contrary to the terms of the contract; (c) it is not in conformity with the law of the State of Missouri on the subject; (d) it is not in conformity with any federal law on the subject; (e) it is contrary to the weight of authority on the questions involved.

3. The Court erred in finding for the respondent that he was totally disabled for the period involved because the facts found in the informal findings of the court contained in the memorandum, before the formal conclusion of law and finding of fact, [compell] the conclusion as a matter of law that the respondent was not totally disabled.

4. The Court erred in refusing plaintiff's requested conclusion of Law I.

5. The Court erred in refusing plaintiff's requested conclusion of Law II.

6. The Court erred in refusing plaintiff's requested finding of Fact I.

[fol. 107] 7. The Court erred in refusing plaintiff's requested finding of Fact II.

8. The Court erred in refusing plaintiff's requested finding of Fact III.

9. The Court erred in refusing plaintiff's requested finding of Fact IV.

10. The Court erred in refusing plaintiff's requested finding of Fact V.

11. The Court erred in refusing plaintiff's requested finding of Fact VI.

12. The Court erred in refusing plaintiff's requested finding of Fact VII.

13. The Court erred in concluding as a matter of law that the plaintiff bore the burden of proof that the defendant was totally disabled within the meaning of the policy of insurance involved.

14. The Court erred in applying a rule or definition of total disability which is contrary to the decisions of the Supreme Court of Missouri.

15. The Court erred in applying a rule or definition of total disability which is contrary to the decisions of the Courts of Appeals of Missouri.

16. The Court erred in applying a rule or definition of total disability which is contrary to the decisions of the United States Circuit Court of Appeals.

17. The Court erred in overruling appellant's motion for a new trial.

Respectfully submitted, Clark, Boggs, Peterson & Becker, Boyle G. Clark, James E. Boggs, Paul M. Peterson, William H. Becker, Howard B. Lang, Jr., Attorneys for Appellant.

[fol. 108] Appearances of counsel omitted in printing.

[fol. 109] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

ORDER OF SUBMISSION—October 3, 1939

This cause having been called for hearing in its regular order, argument was commenced by Mr. William H. Becker for appellants, continued by Mr. Benjamin Phillip for appellee, and concluded by Mr. William H. Becker for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 110] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11,450. November Term, A. D. 1939

NEW YORK LIFE INSURANCE COMPANY, a Corporation, Appellant,

vs.

LEWIS K. STONER, Appellee

Appeal from the District Court of the United States for the Western District of Missouri

Mr. William H. Becker (Mr. Boyle G. Clark, Mr. J. E. Boggs, Mr. Paul M. Peterson, Mr. Howard B. Lang, Jr., Mr. H. Templeton Brown, and Mr. Louis H. Cooke, were with him on the brief) for appellant.

Mr. Benjamin Phillip (Mr. B. L. Kaufmann, Mr. Francis Smith, and Mr. R. E. Culver, were with him on the brief), for appellee.

Before Thomas and Van Valkenburgh, Circuit Judges, and Dewey, District Judge

OPINION—February 19, 1940

DEWEY, District Judge, delivered the opinion of the court:

In this action the appellant, New York Life Insurance Company, asked for a declaratory judgment on four similar combination life and disability insurance policies.

[fol. 111] The policies were issued to Lewis K. Stoner, appellee, who claims to have been totally and permanently disabled since June 29, 1931, as a result of an injury sustained when an automobile struck the wagon in which he was riding.

Payments for total disability were made and premiums waived by the company to September 29, 1933. This action covers the right to benefits for the period between May 29, 1936, until January 7, 1938.

The total and permanent disability provisions of the four policies, except as to amounts, are identical. The provisions pertinent to this controversy are as follows:

"Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, * * * if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived."

At the trial a jury was waived and the trial court filed a memorandum opinion. In that opinion is a comment as follows:

"* * * the defendant * * * was in court, however, (he walked in during the progress of the trial) and we observed him carefully. (It is knowledge made famous by the oft repeated tale that one can obtain a much clearer comprehension of the appearance and nature of an elephant by seeing one than by hearing the learned descriptions of even four eminent men of science.) We observed the defendant carefully. He walked into the courtroom, using a cane, but with only a slight limp, and with no expressions of pain. He appeared to be a strong, vigorous, healthy man, whose manner, features and appearance suggested intelligence above that of the average farmer. * * *

"The whole truth of the matter is that as a result of his injury the defendant has a permanently stiffened ankle; that any extensive use of that ankle is now painful, so that it cannot be extensively used both because of the pain and because of the stiffness; that medical and surgical treatment possibly would remove entirely the pain element in the defendant's ankle condition. The only business in which

[fol. 112] the defendant has had training and experience is that of farming. He is not physically able, because of his injury and its consequences, to perform those farmer's tasks which require the more or less continuous and full use of both feet. That is the extent of his handicap."

With this statement it was startling on first impression to learn that the court had found the insured totally and permanently disabled.

Summarizing his opinion the court concluded the law governing to be as follows:

"To have a declaratory judgment that it is not liable on account of total and presumably permanent disability under a policy of insurance such as are involved in this case an insurance company must prove by the preponderance or greater weight of the credible testimony that the insured can do *any* work; or that he can follow *any* occupation, that is, any of those occupations by which men earn livelihoods for themselves and their families, himself performing such of its duties as substantially constitute that occupation; or that he can engage in any business for remuneration or profit, that is, in any of those businesses by which men earn livelihoods for themselves and their families, himself performing such of its duties as substantially constitute that business."

and made one ultimate Finding of Fact as follows:

"From May 29, 1936, until January 7, 1938, the defendant was totally and presumably permanently disabled by reason of the injury received by him June 29, 1931."

and entered a declaratory judgment that the plaintiff is liable to the defendant for total and permanent disability benefits for the period in question.

The appellant here contends that the court erred: (1) in concluding that the plaintiff bore the burden of proof to show that the defendant was not totally disabled within the meaning of the policies; (2) in the conclusion of law; and (3) in the finding of fact.

As plaintiff's evidence sought to establish that the insured was able to or did engage in a business for remunera-[fol. 113] tion or profit during the period in question, we will limit our discussion to those phrases in the policies.

The only evidence submitted was that of the insured, corroborated by his brother and physicians.

Appellant, New York Life Insurance Company, assumed the burden of proof and is estopped to deny that it was not required to assume that burden.

We would not want to be understood however as holding that it was incumbent on the plaintiff to prove a double negative, as the plaintiff inferred from the court's conclusion of the law. To require a plaintiff to prove a double negative would often result in an unwarranted change of the plain provisions of an agreement.

"Whenever the establishment of an affirmative case requires proof of a material negative allegation, the party who makes such allegation has the burden of proving it, especially where the most appropriate mode of proof is by establishing the affirmative opposite of the allegation." 22 C. J. Evidence, Sec. 15, p. 70.

The most appropriate mode here required the plaintiff to prove, and prove only, the affirmative that the insured can or has during the period in question engaged in some business for profit.

The insured seriously and confidently contends that under the laws of Missouri the facts abundantly establish the total disability of the insured, or at least, substantial evidence to support the ultimate fact found by the trial court.

At the time of the insured's accident he was operating and farming 305 acres. This consisted of two farms, one of 200 acres, known as the Estate Farm, which he rented from his mother, and the balance owned by himself. They were operated as one grain and stock farm. The injury was from a fall resulting in two bones of his lower left leg being jerked out of the ankle joint. Sometime prior to September 29, 1933, he started to manage and operate the two farms in a manner hereinafter described and since that time his physical condition has been about the same, except that the ankle is slightly smaller than it was. The ankle is completely ankylosed and is painful to some extent at all times. He can walk a block or two with the aid of his cane and can drive [fol. 114] his automobile without excess pain. When he overdoes the walking or exercising he often experiences pain so severe that he cannot sleep at night. The injury is perma-

nent. His mind is not affected by the injury and has not been at any time.

Since his injury he has not been able to do the actual physical labor connected with the farming but hires it done. Prior to the injury he employed two men constantly on the farm but since the injury he has been able to operate it with one farm hand on account of the employment of a tractor and modern machinery. Since sometime prior to September 29, 1933, he has continued to operate the farm of 305 acres as a grain and stock farm. He buys livestock, cattle and hogs, from others, feeds the produce of the farm to them and sells the livestock. He goes to St. Joseph, Mo., and buys livestock and also buys livestock from his neighbors and in the purchase of livestock he deals with them personally. He drives his car to Omaha and St. Joseph, a distance of 90 to 100 miles, where he trades at the stockyards. He trades and sells livestock through the same commission men who handled his stock transactions before he was injured. He looks after the livestock on the farm, that is, personally sees it and keeps himself informed and acquainted with what is on the farm.

There is a highway between the two farms and the farms are mostly bordered by roads and he can drive his automobile anywhere that a binder or mowing machine can go, and he does this and drives into the fields and consults with his men about the crops and the method and manner of doing the work. He operates the Estate Farm under an agreement with his mother, pays the operating expenses, including taxes and insurance, and the living expenses of himself and his mother, and makes a profit which he divides with her.

The law becomes important as the court's finding of fact was based upon his conclusion as to the law.

In the interpretation of these insurance contracts, if the law applicable has been decided by the highest court of Missouri, the federal courts are required to follow its decision. Erie R. R. vs. Tompkins, 304 U. S. 64.

That court has not construed the phrase used in insurance policies containing the provision that "disability shall [fol. 115] be considered total whenever the insured is so disabled * * * that he is wholly prevented * * * from engaging in any business for remuneration or profit", or the phrase, "if the insured engages in any business for

remuneration or profit, no further income payments shall be made nor premiums waived."

It has consistently held that where the language of an insurance policy is plain and unequivocal, there is no room for construction and the words must be given their usual and natural meaning. State ex rel. Com. Casualty Co. v. Cox, 322 Mo. 38, 14 S. W. 2d 600; Prange v. Intern. Life Ins. Co., 329 Mo. 651; State ex rel. Mutual Benefit Assn. v. Trimble, 334 Mo. 920; State ex rel. Met. Life Ins. Co. v. Hostetter, 338 Mo. 589, 92 S. W. 2d 112; Heald v. Aetna Life Ins. Co., 340 Mo. 1148; State v. Shain, — Mo. —, 127 S. W. 2d 675.

In Wendorff v. Missouri State Life Ins. Co., 318 Mo. 363, 370, the court said:

"In the construction of the policy, the rules to be followed are well settled. The policy is a contract. Plain and unambiguous language must be given its plain meaning. The contract should be construed as a whole; but insofar as open to different constructions, that most favorable to the insured must be adopted. * * * However, * * * the rule 'does not authorize a perversion of language, or the exercise of inventive powers for the purpose of creating an ambiguity where none exists'."

In considering purely occupational and group insurance policies it has construed somewhat similar provisions insofar as they related to inability to perform any work or follow any occupation as being ambiguous and requiring judicial construction, and have held such construction requires that most favorable to the insured be adopted. So the phrase "any and every duty" was construed judicially to mean "any and every substantial duty," and the phrase "permanently, continually and wholly prevented from performing any work for compensation or profit", held ambiguous and open to judicial construction. State ex rel. Met. Life Ins. Co. v. Allen, 337 Mo. 525, 85 S. W. 2d 469; Met. Life Ins. Co. v. Hostetter, 338 Mo. 589; Heald v. Aetna Life Ins. Co., 340 Mo. 1143, 1149.

[fol. 116] In the Heald case, supra, the Supreme Court of Missouri apparently adopts the rule in occupational and perhaps in group insurance cases, as follows:

"The rule prevailing in most jurisdictions is that the 'total disability contemplated by an accident policy, or the

disability clause of a life policy does not mean, as its literal interpretation would require, a state of absolute helplessness; rather, that the disability contemplated means inability to do all the substantial and material acts necessary to the prosecution of the insured's, or, in many instances, any, business or occupation, in a customary and usual manner. (Headnote to Annotations in 98 A. L. R. 789.) The leading cases cited therein from this State are James v. Casualty Co., 113 Mo. App. 622, 88 S. W. 125; Foglesong v. Modern Brotherhood of America, 121 Mo. 548, 97 S. W. 240; Bellows v. Travelers' Ins. Co. (Mo.) 203 S. W. 978'."

In this decision the court was discussing a purely occupational insurance policy. The words "in a customary and usual manner" mean the same as "to substantially perform." Giving to the decisions of the Supreme Court of Missouri their broadest interpretation, it might be said that in considering phrases in insurance policies similar to the one here in issue, they might construe the phrase most favorable to the insured and say that the interpretations should be, that the disability contemplated means, inability to substantially perform all the substantial and material acts necessary to the prosecution of the insured's, or any, business.

This construction is practically the same as that given by the Federal courts to the term "totally disabled" contained in war risk insurance policies. Lumbra v. United States, 290 U. S. 551; United States v. Green, (C. C. A. 8) 69 F. 2d 221; United States v. Rice, (C. C. A. 8) 72 F. 2d 676, 677; Thompson v. United States, (C. C. A. 8) 65 F. 2d 897; United States v. Weeks, (C. C. A. 8) 62 F. 2d 1030; United States v. Harth, (C. C. A. 8) 61 F. 2d 541, 546; United States v. Vineyard, 71 F. 2d 624; United States v. Nickle, 70 F. 2d 873, 879; United States v. Rye, 70 F. 2d 151, 153; United States v. Sumner, 69 F. 2d 770.

The appellee contends that the construction should go further and the phrases interpreted as limited to the busi-
[fol. 117] ness or occupation in which insured was engaged when the insurance policies were issued.

And that the phrases should be interpreted as meaning that the insured must perform the substantial and material acts of any business by his own physical efforts.

It may be that some of the appellate courts of Missouri have so construed similar insurance policies.

We are not bound to follow the decisions and reasoning of the intermediate appellate courts of Missouri. Erie R. R. v. Tompkins, supra; Graham v. White-Phillips Co., 296 U. S. 27, 31; Beals v. Hale, 45 U. S. 36, 54; Hudson v. Moonier, (C. C. A. 8) 94 F. 2d 132, 138; Hudson v. Maryland Casualty Co., (C. C. A. 8) 22 F. 2d 791.

The agreement is obviously not restricted to total disability as to a specific occupation, but includes inability to perform any work, any occupation, or engage in any business for profit, and there is nothing to indicate that the Supreme Court of Missouri has or would adopt such a construction which is contrary to the weight of authority. See Annotations 98 A. L. R. 789; 79 A. L. R. 857.

An interpretation that to constitute engaging in any business for remuneration and profit means that he himself must physically be able to perform all of the duties of the business as substantially constitute that business would do violence to the plain terms of the policy agreement. Unwarranted results would follow from such a construction, for if a man were engaged in a mercantile business and could do all the substantial and material acts necessary and proper in carrying on of that business he would under this interpretation be considered totally disable if he were unable to do the work of every clerk and employee in that business.

The trial judge decided that the phrase, engaging in any business for remuneration or profit, was not limited to the specific business in which the insured was engaged when the policy was issued to him, but as he did use the expression "himself performing such of its duties as substantially constitute that business", it might indicate that it was necessary for insured to be physically able to perform all the [fol. 118] acts of any business as distinguished from all the acts necessary to carry on any business.

The wording of the quoted law from the Heald case, supra, is "acts necessary to the prosecution of . . . any business," and not all acts of any business.

To interpret these phrases as meaning that it was necessary for insured to perform all the acts or duties of any business, would do violence to the repeated pronouncements of the Supreme Court of Missouri, that where the language is plain and unequivocal, there is no room for construction and the words must be given their usual and natural meaning.

It is true that in transacting some of the details of the business in which the insured has been engaged he is discommoded and slowed up by his injury, but this condition does not prevent him and he is able, and does, without any excess pain perform all the material and substantial duties to carry on the business in which he is now engaged. He himself testifies that he is able to perform the duties of this business. He detailed the duties that he now performs in the operation of these farms and testified that he was able to and did perform all of them. There is nothing in the record to indicate that this was done by him in excess of his strength, or with excessive pain or injury to his health.

He is engaging in—that is, devoting attention and effort to, prosecuting or carrying on—a business for profit. Here we do not have to speculate upon whether he can do all such material duties of his business made necessary by engaging therein, for the evidence conclusively establishes that he does do them. Is he engaged in a business? Were he asked what his business was, the last thing he would think of to say would be that he is not engaged in any business.

We are constrained to find that the evidence conclusively establishes that the insured not only can but does substantially perform all the substantial and material acts necessary to the prosecution of the business in which the insured is engaged and that such business returns a profit. The judgment will be reversed with directions to the trial court to enter a declaratory judgment as requested by the appellant.

Reversed.

[fol. 119] DISSENTING OPINION

THOMAS, Circuit Judge, dissenting.

In my opinion the finding and decision of the majority is contrary to the law of the case. The policies in suit are Missouri contracts and their construction is governed by Missouri law. Turner v. New York Life Insurance Co., (C. C. A. 8) 100 F. 2d, 193; New York Life Ins. Co. v. Levin, (C. C. A. 8) 102 F. 2d, 403, 405.

The injury resulting in the insured's disability occurred on June 29, 1931. From that date until September 29, 1933,

the insurance company conceded that the disability was "total and presumably permanent" within the meaning of the policies, paid the insured the benefits provided therein and waived payment of premiums.

Since the latter date the policies here in suit have been much litigated. A case involving them has been here before. New York Life Ins. Co. v. Stoner, (C. C. A. 8) 92 F. 2d, 845. In that case this court held that under the provisions of the policies "a judgment in favor of the insured for one period of time did not bind the insurance company in an action for disability benefits for a subsequent period." In addition to that case three different suits have been brought by Stoner in the state courts of Missouri to recover benefits for subsequent periods. The first suit was brought on the four policies in the Circuit Court of Buchanan County to recover disability benefits for the period from September 29, 1933, to March 29, 1934. That case was tried and appealed to the Kansas City Court of Appeals. Stoner v. New York Life Ins. Co., 90 S. W. 2d 784. The second suit was brought in the Circuit Court of Platte County (transferred for trial to Daviess County) on two of the policies to recover for the period from April 29, 1934, to May 29, 1936. This case was tried and appealed to the Kansas City Court of Appeals. Stoner v. New York Life Ins. Co., 114 S. W. 2d 167. The third suit on the two policies not declared on in the suit in Platte County was brought in the Buchanan County Circuit Court to recover for the period from May 29, 1934, to May 29, 1936.

The period covered by the present suit for a declaratory judgment is from May 29, 1936, to January 7, 1938.

In my view the majority opinion errs in that (1) the issues are not correctly stated, (2) the evidence in reference to the injury sustained by the insured and its effect is minimized, [fol. 120] (3) the Missouri law is misinterpreted or ignored, and (4) an undue emphasis is placed on the fact that during the period under inquiry the insured was able successfully to direct his farm operations. This being a minority opinion I shall direct attention to these matters briefly without undertaking to demonstrate them at length.

1. The Issues.—To sustain the burden of proving that the insured was not totally and presumably permanently disabled within the meaning of the policies during the period in issue, the plaintiff introduced in evidence the poli-

cies and a transcript of the testimony taken in the trial in Daviess County and which was before the Kansas City Court of Appeals and considered by that court in the opinion in 114 S. W. 2d 167.

The policies provide that the company agrees to pay monthly benefits and to waive premiums "upon receipt of due proof that the insured is totally and presumably permanently disabled before age sixty, as defined * * *." The definition recites: "Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit."

In his applications for the policies the insured stated that he was a farmer, that he owned and operated a grain and stock farm, and that he had had no previous occupation.

In its petition for a declaratory judgment the plaintiff, appellant, alleged that "the defendant has been engaged in a recognized work, business and occupation for profit and from which he obtains a livelihood."

Upon the trial the evidence offered by appellant all related to the operation of the grain and stock farm which the insured was operating at the time the policies were issued. In objection to a question counsel for appellant said "the exact duties are stated in the application for insurance and no other duties are covered by the issues in this case."

The appellant offered no evidence to prove, and made no claim, that the insured could perform any work, follow any occupation or engage in any business for profit other than in the operation of the farm which he was operating when the policies were issued.

[fol. 121] The majority opinion erroneously states that "The *appellee* contends that the construction of the (policies) should go further and the phrases interpreted as limited to the business or occupation in which insured was engaged when the insurance policies were issued." The opinion then clouds the issues by holding that the burden is on the appellant but in effect dealing with the problem as if the burden were on appellee. It works out that the majority avoids the application of the Missouri law by an attempt to distinguish between the policies in suit and "occupational insurance" policies. Such a distinction is not warranted. The appellant having the burden of proof tried this case on the theory that the insured is engaged in the

"occupation" and business of operating a grain and stock farm.

2. The Injury and Its Effects.—The appellee was injured June 29, 1931. The bones in his ankle were broken. The main bone in his leg was broken about four inches above the ankle. The ankle became ankylosed. Infection developed resulting in calcification and the destruction of the ankle joint. The muscles of the lower leg are attached to the bone and do not function. The injured foot and ankle are larger than normal and are painful. There is permanent infection. The blood does not circulate properly in the foot and it is cold.

After the injury insured was in the hospital two months. He was then in bed at home for three months; then in a wheel chair for a month; then on two crutches for a month; then on one crutch and a cane for a month; and since that time he can get about with one cane. He can walk from one to two blocks in a day, but when he does so, his ankle swells and he can not sleep at night for the pain. He can drive his automobile, but it has the same effect as walking. He can not walk on rough or uneven ground. This condition is permanent, and he can do no physical labor.

3. The Missouri Law.—The latest pronouncement of the Supreme Court of Missouri in a case of this character is found in Heald v. Aetna Life Ins. Co., 340 Mo. 1143, 104 S. W. 2d 379. The policy there considered provided for total disability benefits if the injury "wholly and continuously disable the insured from date of accident and prevent him from performing any and every duty pertaining to his oc- [fol. 122] cupation." With reference to the rule of construction the court said:

"• • • that where the language of an insurance policy is plain and unequivocal there is no room for construction and the words employed must be given their usual and natural meaning. *State ex rel.* v. *Cox*, 322 Mo. 38, 14 S. W. 2d 600, loc. cit. 602, 603. Such is the rule, but to that rule there is an equally well settled exception, viz.; If the language is ambiguous, i. e., open to different interpretations, its meaning is to be determined by judicial construction, and in insurance contracts the construction most favorable to the insured must be adopted. *State ex rel. Security Ins. Co.* v. *Allen, et al.*, 305 Mo. 607, loc. cit. 614, 267 S. W. 379,

381. The rule prevailing in this state and in most other jurisdictions is to the effect that a provision such as the one before us, with respect of the phrase 'any and every duty,' would render the contract utterly useless to an assured and would be nothing short, practically speaking, of collecting a premium without rendering a consideration in so far as the total disability clause is concerned (*James* v. *Casualty Co.*, 113 Mo. App. loc. cit. 629); so said provision in this policy must be construed so as to make the provision effective. The rule prevailing in most jurisdictions is that the 'total disability contemplated by an accident policy, or the disability clause of a life policy does not mean, as its literal interpretation would require, a state of absolute helplessness; rather, that *the disability contemplated means inability to do all the substantial and material acts necessary to the prosecution of the insured's,* or, in many instances, any, *business or occupation,* in a customary and usual manner.' Headnotes to Annotations in 98 A. L. R. 789. The leading cases cited therein from this state are *James* v. *United States Casualty Co.*, 113 Mo. App. 622, 88 S. W. 125, 127; *Foglesong* v. *Modern Brotherhood of America,* 121 Mo. App. 548, 97 S. W. 240; *Bellows* v. *Travelers' Ins. Co.* (Mo. Sup.) 203 S. W. 978." (Italics supplied).

The Bellows case, supra, was decided by the Supreme Court of Missouri in 1918. The court therein approved and followed the rule in the James case (1905), supra, that total disability, as used in an insurance policy, does not mean "that the assured was rendered absolutely and literally unable to perform any part of his occupation, but that [fol. 123] he was disabled from performing substantially the occupation stated in the policy."

The Foglesong case referred to in the opinion in the Heald case, supra, was decided by the Kansas City Court of Appeals in 1906. The contract in that case provided for the payment of disability benefits upon proof "of the permanent and total disability of the said member (plaintiff), which renders him unable to carry on or conduct any vocation or calling." The insured was a farmer. His right leg was afflicted with a permanent disease which at first confined him to his bed for three months. There was some improvement so that he could walk on crutches and after a while with the aid of a cane. "It was shown that he directed the work to be done on his farm, and that he performed some of the labor himself". He drove the wagon in

hauling corn and coal, and he directed his sons in carrying on the business of the farm. The court said: "The language of the policy, 'permanent and total disability of said member, which renders him unable to carry on or conduct any vocation or calling', the vocation of the insured not being designated, should be construed as meaning, if anything, the vocation or calling which he might be following at the time he became disabled." (citing authorities) The court then approved the rule of the James case, supra, that permanent and total disability means to be "disabled from performing substantially the occupation stated in the policy."

Having been approved by the Supreme Court in the Bellows case, the James and Foglesong cases, supra, have long been accepted by the Supreme and Appellate Courts of Missouri as correctly stating and applying Missouri law and as authorities governing the interpretation of all substantially similar forms of disability provisions.[1]

[fol. 124] The evidence introduced by appellant showed that the "substantial and material acts necessary to the

[1] Burns v. Aetna Life Ins. Co., 123 S. W. 2d 185; Stoner v. New York Life Ins. Co., 114 S. W. 2d 167; Smith v. Metropolitan Life Insurance Co., 108 S. W. 2d 995; Pogue v. Metropolitan Life Ins. Co., 107 S. W. 2d 144; Barton v. Metropolitan Life Insurance Co., 103 S. W. 2d 889; Corcoran v. Metropolitan Life Ins. Co., 93 S. W. 2d 1027; Stoner v. New York Life Ins. Co., 90 S. W. 2d 784; Heald v. Aetna Life Ins. Co., 90 S. W. 2d 797, affirmed in 340 Mo. 1143, 104 S. W. 2d 379; Farmer v. Metropolitan Life Ins. Co., 85 S. W. 2d 235; Young v. Metropolitan Life Ins. Co., 84 S. W. 2d 1065; Moss v. Metropolitan Life Ins. Co., 84 S. W. 2d 395, reviewed on certiorari in State ex rel. Metropolitan Life Ins. Co. v. Hostetter, 338 Mo. 589, 92 S. W. 2d 112; Buis v. Prudential Ins. Co. of America, 77 S. W. 2d 127; Kane v. Metropolitan Life Ins. Co., 73 S. W. 2d 826, reviewed on certiorari in State ex rel. Metropolitan Life Ins. Co., v. Allen, 337 Mo. 525, 85 S. W. 2d 469; Rickey v. New York Life Ins. Co., 71 S. W. 2d 88; Hurt v. Equitable Life Assur. Soc., 53 S. W. 2d 1101; Katz v. Union Central Life Ins. Co., 44 S. W. 2d 250; Frost v. Central Business Men's Ass'n, 246 S. W. 628; Ramsey v. General Accident, Fire & Life Ins. Co., 142 S. W. 763; Albert v. Metropolitan Life Ins. Co., 95 S. W. 2d 343.

prosecution" of carrying on the occupation and business of operating the insured's 305-acre farm consisted of two parts, one of which was largely physical and the other mental. They were (a) handling horses and livestock, plowing, listing, cultivating corn, sowing, reaping, harvesting crops, walking and husking corn, scooping corn and grain, pitching hay, physical work of all kinds; and (b) directing and supervising hired men, deciding when to plant and harvest, buying and selling livestock and grain. Before the injury the insured was able to do and did all of these duties. Since the injury he has been and always will be unable to do any of the physical acts necessary to farming. He can now and ever since the injury occurred has been able to direct the farming operations, but he can not supervise the work. He buys livestock through a broker, but he can not go to the stock yards and inspect the stock and never can do so.

In the Heald case the court pointed out that the business or occupation of the insured cannot be considered as a "double occupation * * * composed of separate functions." The business or occupation must be considered as "a unit, involving interrelated duties, to be normally carried on by the performance of all the substantial duties in it."

On both appeals in the suits on these policies the Kansas City Court of Appeals considered the testimony and reviewed the decisions of the Supreme and Appellate courts of Missouri and held that the question of total and presumably permanent disability was a jury question. In a similar case arising in Kentucky where the law is the same as in Missouri and in which the language of the policy in suit was equivalent to that in these policies and the testimony in reference to the injury very much the same, the Circuit Court of Appeals of the Sixth Circuit held that the question of total disability was for the jury, Equitable Life Assur. Soc. of the United States v. Bomar, (C. C. A. 6) 106 F. 2d 640, 643, and that the evidence was sufficient to sustain a verdict against the insurance company.

In the present case Judge Otis of the district court, without reference to the decisions of the Missouri courts, found [fol. 125] that the plaintiff did not sustain the burden of proof which it assumed and that Stoner was totally and permanently disabled during the period in issue within the meaning of the policies. I do not think his finding upon this

record can be held under the Missouri law to be "clearly erroneous". Rule 52(a) of the Rules of Civil Procedure.

4. The Conclusion.—The majority conclude that because the insured is a healthy man except for the injury to his limb, is able to walk short distances, can drive his car for some distance without undue pain and is able to direct successfully the operations of his farm, the result must necessarily follow that a finding that he is "totally disabled" within the meaning of the policies can not be sustained. They arrive at this conclusion by emphasizing these facts in contravention to the rule that the evidence should be viewed in the light most favorable to the insured on this appeal and by entirely divorcing from consideration that part of the insured's occupation requiring physical labor. This in my opinion is a substitution of the views of a federal court for the law of Missouri.

Stoner, even if completely paralyzed but still able to be driven about in an ambulance, might well continue to operate his farm as successfully as he now does; and the argument might still be advanced that he was not "wholly prevented from * * * engaging in any business for remuneration or profit." It is to avoid the harshness of a literal application of the terms of policies of this kind that has led the courts of Missouri and those of other jurisdictions to hold that disability is total when the insured is unable to perform all the substantial and material acts of his business or occupation in a customary and usual manner. To this rule the further qualification is added that the insured's business must not be viewed as a double occupation made up of separate functions but must be considered as a unit involving interrelated duties.

The majority refuse to apply these principles to the facts in the instant case. I am of the opinion that under the law of Missouri the evidence amply sustains the finding of the district court.

The judgment appealed from should be affirmed.

[fol. 126] CONCURRING OPINION

VAN VALKENBURGH, Circuit Judge, Concurring.

I concur heartily in Judge Dewey's opinion and feel that the conclusion he has reached requires no additional sup-

port. However, I cannot agree with Judge Thomas' view of the Missouri law as declared by the highest court of that state. As stated by Judge Dewey, "there is nothing to indicate that the Supreme Court of Missouri has or would adopt such a construction which is contrary to the weight of authority". Of course this contract is governed by Missouri law, and this court must apply the state law as declared by the highest state court.

It must follow now, as before the decision in Erie Railroad Co. v. Tompkins, 304 U. S. 64, that, absent state statute, federal courts are constrained to follow the construction placed upon the law by state courts only when such construction is clearly established. I do not by this mean to imply that the Supreme Court of Missouri would construe this permanent disability clause of the insurance contract as claimed by appellee. I do not think it could or would do so. It is sufficient for the purposes of this case that it never has done so.

It is charged that the majority opinion does not correctly state the issue. On the contrary, the broad issue is clearly apparent. It is whether the highest court in this state will continue to adhere to its consistently declared rule of decision that, in insurance contracts, as in all contracts, plain and unambiguous language must be given its plain meaning; or whether "the perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none existed" shall be authorized and approved. Wendorff v. Missouri State Life Insurance Co., 318 Mo. 363. This insurance contract states with exceptional clearness what the appellant company undertook to do. With explicit pains it confined its liability to cases where by the injury the insured is not only prevented from performing any work, but also "from following any occupation or from engaging in any business for remuneration or profit". The obvious purpose was thus to limit the scope of its responsibility. The majority opinion does not erroneously "attempt to distinguish between the policies in suit and occupational insurance policies". The distinction stands out clearly on the face of these policies. The purpose of the in- [fol. 127] surer to make that distinction is evident. It would be difficult to frame language more descriptive of that purpose. The majority opinion seeks only to give effect to the contract made.

In his application for this insurance coverage, when re-

quested to state his exact duties in full, he replied, "owns and operates grain and stock farm". It is true that "the appellant having the burden of proof tried this case on the theory that the insured is engaged in the "occupation and business of operating a grain and stock farm"; and so he is. There is no trouble about the burden of proof. If the evidence, by whomsoever produced, discloses the true situation, judgment should go accordingly. Complainant introduced evidence that established beyond dispute, and was undisputed, that appellee was during the period in question, following an occupation and engaged in a business for remuneration and profit; therefore, within the terms of the disability clause. He was conducting these operations substantially as he did before he was injured, with less physical participation on his part, and with less men employed, and, as he expresses it, with more modern machinery. He does all the substantial and material acts essential on his part to the operations in which he is engaged. There are, of course, humane modifications of any too strict construction of total disability provisions. Judge Woodrough, sitting in District Court, announced the following rule, which received the full approval of this court, United States v. Rice, 72 F. 2d l. c. 677, 678:

"'By a 'total disability' is meant not necessarily that the man is flat on his back or bedridden, unable to move at all, but it means that assuming a good faith continuous and continued endeavor and effort on his part his disability is such as to render it impossible for him to carry on continuously a substantially gainful occupation. By 'substantially gainful occupation' is meant an occupation that produces and gains a man a fair and decent living having regard to his station, and by 'continuously carry on' is not meant necessarily that he should work every day, so many hours per day, but that he should be able to carry on assuming, as I say, a fairly good faith effort, but not assuming any such strain and endeavor as would jeopardize his health or his life, but he should carry on with reasonable and fair regularity, having in mind the way in which occupations are carried on under our system in this country".

[fol. 128] Under this rule, and under any construction announced by the Supreme Court of Missouri, appellee is now following an occupation and is engaged in a business for

remuneration and profit within the terms of the total disability clause. If the conditions were such that appellee could not carry on a substantially gainful occupation because of his injury the situation might be as appellee contends, but that is not the case here. As said by this court in United States v. Harth, 61 F. 2d 541:

"It is to be presumed that any appreciable degree of disability is attended by discomfort, pain, or, at least, by inconvenience and handicap in the discharge of the normal activities of life. If such conditions are to be deemed sufficient to warrant recovery under the terms of a war risk policy, then the precision with which the degree of disability, necessary for such recovery, has been defined was wholly unnecessary.

. . . . . .

We cannot approve recovery upon a contract of insurance, the express and crucial terms of which have obviously not been met".

Appellee has so far recovered from his injury that he is carrying on his operations, with some inconvenience of course, but substantially as he did before his injury. According to appellee's theory, such a recovery would be impossible if any appreciable effects of that injury remained, thereby disregarding the distinction between temporary and partial disability and permanent and total disability. Appellant, with commendable indulgence, continued disability payments, perhaps beyond the necessary period, until appellee's condition became manifest and certain. There is a measure of irony in the fact that this conduct is adverted to as a concession favorable to appellee's recovery in this case. Appellant, in contesting further disability payments, acted within its contract rights. Of a similar situation this court said in United States Fidelity and Guaranty Co. v. McCarthy, 33 F. 2d 7, 13:

"A person may be disabled today, and in a year from now, without any change in the physical condition, not be disabled. A one-handed man may not be able to perform surgery today, and in a year from today may have overcome to some extent his disability and be able to perform some part of the substantial duties of a surgeon. If appellee's hand remains in the same condition for the years to come, [fol. 129] it might be that he could do some surgical work,

and it might be he could not. That is a question of fact to be determined for the period for which he seeks to recover indemnity. That his hand remains in the same condition is not conclusive that his disability also continues".

New York Life Insurance Co. v. Stoner, 92 F. 2d 845, 848.

In order to prevent undue length to his opinion Judge Dewey has not quoted largely from the testimony. The record, however, lends overwhelming support to his conclusion, —in fact there is, in our judgment, no room for disagreement as to its weight. The trial judge in his opinion, as quoted in the majority opinion, of this court, has supplied for us a convincing personal view of the physical condition of the insured. It being the judgment of the majority that the evidence in favor of appellant leaves no disputed question for the trier of the facts, Rule 52 of the Civil Code is without application. Nor was it necessary for appellant to prove by the greater weight of the testimony that the insured can follow any or all of those occupations by which men may earn livelihoods. It is enough that he can and does follow one such occupation for remuneration and profit.

It is with much regret that I feel constrained to disagree with one of my associates in the premises, but the matter is of such importance not only to the soundness of insurance contracts, but to the integrity of contract construction generally, that I have felt impelled to add my express concurrence in Judge Dewey's excellent opinion, and disposition of the cause.

[fol. 130] In United States Circuit Court of Appeals,
Eighth Circuit

No. 11450

New York Life Insurance Company, a Corporation,
Appellant,

vs.

Lewis K. Stoner

Judgment—February 19, 1940

Appeal from the District Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the

record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the New York Life Insurance Company, a corporation, have and recover against Lewis K. Stoner the sum of Two Hundred Nineteen and 30/100 Dollars for its costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause, be, and the same is hereby, remanded to the said District Court with directions to enter a declaratory judgment as requested by the appellant.

[fol. 131] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

APPELLEE'S PETITION FOR REHEARING—Filed March 2, 1940

Comes now appellee and moves the court to set aside its finding, judgment and opinion herein, and petitions the court to grant him a rehearing for the reasons and upon the grounds following, to-wit:

(1) Because the court erred in ruling that the provisions of the policies are plain and unequivocal, and that the Supreme Court of Missouri has never held that such provisions are ambiguous. In so ruling, the court not only overlooked the fact that the Supreme Court of Missouri in State of Missouri ex rel. New York Life Insurance Company v. Shain et al., reviewed the ruling of the Kansas City Court of Appeals in Stoner v. New York Life Insurance Co., 90 [fol. 132] S. W. (2d) 784, on the policies involved in this case and denied the contention of the relator (plaintiff here) and the pronouncement of this court that the policies are plain and unequivocal. And the court overlooked State ex rel. v. Allen, 337 Mo. 525, State ex rel. v. Hostetter, 338 Mo. 589, and Heald v. Aetna Life Insurance Company, 340 Mo. 1143.

(2) Because the court failed to follow the common law of Missouri as declared and settled for more than a half cen-

tury by decisions of its Supreme Court and all of its courts of appeal that the provisions of the policies are ambiguous and permit a recovery if the insured is unable to do all the substantial and material acts necessary to the prosecution of his occupation or any business he would be capable of carrying on but for his injury.

(3) Because the court erred in deciding it was not bound by the decisions of the Kansas City Court of Appeals in the two Stoner cases or by any other decision of any court of appeals.

(4) Because the court erred in ruling that the evidence was not sufficient to make a case for a jury (or a court sitting as a jury) but showed as a matter of law that appellee was not totally disabled; and in so doing overlooked the evidence in the case.

(5) Because the court erred in deciding the case on its finding of facts when it has no power to find the facts.

(6) Because in reversing the judgment below with directions to enter a declaratory judgment as requested by appellant, the court overlooked the fact that the pleadings [fol. 133] and the record show that the court had no jurisdiction to render a declaratory judgment in favor of appellant because the allegation in the petition that the amount in controversy exceeds $3,000.00 is specifically denied by the answer and no evidence was introduced to sustain the allegations of the petition.

In support of all of which appellee submits the attached suggestions and authorities as a part of this petition.

Benjamin Phillip, Francis Smith, Basil Kaufmann,
Attorneys for Appellee; R. E. Culver, of Counsel.

I, Benjamin Phillip, do hereby certify that the above and foregoing Petition is filed in good faith and he believes the same to be meritorious.

Benjamin Phillip.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—March 22, 1940

The petition for rehearing filed by counsel for appellee in this cause having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

[fol. 134] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

CLERK'S CERTIFICATE

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein the New York Life Insurance Company, a corporation, was Appellant, and Lewis K. Stoner was Appellee, No. 11450, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the third day of April, A. D. 1940, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Western District of Missouri.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-ninth day of April, A. D. 1940.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal.)

[fol. 135] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 45.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Kendall B. Randolph. File No. 44,407. U. S. Circuit Court of Appeals, Eighth Circuit, Term No. 74, Lewis K. Stoner, Petitioner, vs. New York Life Insurance Company. Petition for a writ of certiorari and exhibit there[illegible] Filed May 10, 1940. Term No. 74 O. T. 1940.

Blank Page

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 10 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. [redacted] 74

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

PETITION FOR WRIT OF ERROR AND SUPPORTING BRIEF AND ARGUMENT.

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With him on Brief
R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

Blank Page

INDEX

Petition for Writ of Certiorari 1

Opinion of Circuit Court of Appeals (Record 109-127) 1

Judgment of United States Circuit Court of Appeals (Record 128)

Reasons for Allowance of This Writ 7

Brief in Support of Petition 13

Argument—

I. The Missouri law governs 13

II. The finding of the district court was binding on the court below if there was substantial evidence to support it 13

III. The court below failed and refused to follow the law of Missouri declared both by its Supreme Court and its courts of appeals, and in holding it was not bound by the decisions of the latter courts, the ruling below is in conflict with the decisions of this court and the Circuit Courts of Appeals for the Second, Third, Seventh and Ninth Circuits 14

IV. In the absence of a contrary decision of the state Supreme Court, the Missouri courts of appeals are courts of last resort and declare the law of the state 15

V. In ruling that the policies are unambiguous, the decision of the court below is in conflict with the decisions of the Supreme Court of Missouri 28

VI. In its findings of fact the court below completely disregarded the undisputed evidence, and misconstrued the Missouri cases 33

VII. In ordering the district court to enter a declaratory judgment in favor of respondent, without evidence to prove the jurisdictional amount in dispute, the decision of the court below is in conflict with the decisions of this court 41

TABLE OF CASES

Barcolini vs. Atlantic City S. R. Co., 82 N. J. L. 107 18

Barton vs. Metropolitan L. Ins. Co., (St. Louis, 1937) 103 S. W. 2d 889 ..... 10, 28

Bellows vs. Travelers Ins. Co., 203 S. W. 978 ..... 11, 27, 29, 32

Berlet vs. Lehigh Valley Silk Mills, (C. C. A. 3) 287 Fed. 769 ..... 8, 19

Blair vs. Com. of Internal Revenue, 300 U. S. 5-14 9

Burns vs. Aetna Life Ins. Co., (St. Louis, 1939) 123 S. W. 2d 185, l. c. 191 ..... 10, 25, 28

Cravens vs. New York Life Ins. Co., 148 Mo. 583, (Aff.) 178 U. S. 583 13

Curreri vs. Vice, (C. C. A. 9) 77 F. 2d 130 ..... 9, 22-23

Erie R. Co. vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188 ..... 7, 9, 15

Erie Railroad Co. vs. Hilt, 247 U. S. 97 ..... 9, 18, 19

Erie Railroad Co. vs. Duplak, 286 U. S. 440-444 9

Ex parte Zimmerman, (C. C. A. 3) 48 F. 2d 76 ..... 8, 22

Equitable Life Assur. Society vs. Bomar, 106 F. 2d 640 37

Fairchild vs. Lohman, 13 F. 2d 252, l. c. 254 ..... 16, 17

Fogelsong vs. Modern Brotherhood of America, (Kansas City, 1906) 121 Mo. App. 548 ..... 9, 26, 27, 33, 35, 37

Heald vs. Aetna Life Ins. Co., (Kansas City, 1935) 90 S. W. 2d 797; affirmed 340 Mo. 1143 ..... 10, 27, 28, 35, 41

Hudson et al., Exrx., vs. Moonier, 304 U. S. 397 ..... 9, 24

In re Gilligan, Troy Wagon Works Co. vs. Hancock, (C. C. A. 7) 152 Fed. 605 ..... 8, 20

In re Kountze Bros., City of Los Angeles vs. Irving Trust Co., (C. C. A. 2) 103 F. 2d 785, l. c. 789 ..... 8, 24

James vs. Casualty Co., (Kansas City, 1905) 113 Mo. App. 622 ..... 9, 26, 27, 33

John T. Porter Co. vs. Java Cocoanut Oil Co., (C. C. A. 9) 4 F. 2d 476 9

Kane vs. Metropolitan Life Ins. Co., (Springfield, 1934) 228 Mo. App. 649 ..... 10, 28, 30

Katz vs. Union Central Life Ins. Co., (Kansas City, 1931) 226 Mo. App. 618 ..... 10, 27

Kaufman & Baer vs. Monroe Motor Line Co., 124 Pa. Super. 27 21

Kvos vs. Associated Press, 299 U. S. 269 ..... 11, 41, 43

Masino vs. West Jersey & S. R. R. Co., (C. C. A. 3) 41 F. 2d 645 ..... 8, 22

McNutt vs. General Motors Acceptance Corporation, 298 U. S. 178 ..... 11, 41, 42

Moss vs. Metropolitan L. Ins. Co., (St. Louis, 1935) 230 Mo. App. 70 ..... 10, 28, 32

Mutual Life Ins. Co. vs. Johnson, 293 U. S. 335, 79 L. Ed. 398 13

Myers vs. Ocean Acc. Corp., 99 F. 2d 485, l. c. 488 13

New York Life vs. Stoner, 109 F. 2d 874 ..... 1, 7

New York Life Ins. Co. vs. Levin, 102 F. 2d 403, 405 13

North Philadelphia Trust Co. vs. Smith, (C. C. A. 3) 13 F. 2d 585 ..... 8, 20

Northwestern Mutual Life Ins. Co. vs. McCue, 223 U. S. 234, 56 L. Ed. 419 13

Pogue vs. Metropolitan L. Ins. Co., (St. Louis, 1937) 107 S. W. 2d 144 ..... 10, 26, 28

Prange vs. International Life Insurance Company, 329 Mo. 651 4

Rickey vs. N. Y. Life Ins. Co., (St. Louis, 1934) 229 Mo. App. 1226 ..... 10, 28

Ruhlin vs. New York Life Ins. Co., 304 U. S. 202, l. c. 209 ..... 9, 24

Shaw vs. U. S. Fidelity & G. Co., 101 F. 2d 92, l. c. 96 13

Staten Island Cricket & Baseball Club vs. Farmers Loan & Trust Co., 58 N. Y. S. 460 24

State ex rel. vs. Allen, 337 Mo. 525, reviewing on certiorari decision of Springfield Court of Appeals in Kane vs. Metropolitan Life Ins. Co., 228 Mo. App. 649 ..... 10, 11, 28, 29, 30

State ex rel. Commonwealth Casualty Company vs. Cox, 322 Mo. 38 4

State vs. Fidelity & Deposit Co., 99 S. W. 2d 476, l. c. 478 25

State Farm Mutual Auto Ins. Co. vs. Coghran, 303 U. S. 485, 82 L. Ed. 970 14

State ex rel. vs. Hostetter, 338 Mo. 589, reviewing on certiorari decision St. Louis Court of Appeals in Moss vs. Metropolitan Life Ins. Co., 230 Mo. App. 70 ..... 10, 11, 28, 29, 32

State ex rel. Mutual Benefit Association vs. Trimble, 334 Mo. 920 4

State ex rel. New York Life Ins. Co. vs. Shain (see Appendixes A and B) 11, 28

State ex rel. Packing Co. vs. Reynolds, 287 Mo. 697, l. c. 710 16

State ex rel. Security Insurance Co. vs. Trimble, 318 Mo. 173, l. c. 178 ..... 16, 17

State ex rel. Winters vs. Trimble, 315 Mo. 1295, l. c. 1301 ..... 16, 17

Stoner vs. N. Y. Life Ins. Co., (Kansas City, 1936) 90 S. W. 2d 784 ..... 9, 14, 27, 29, 45

Stoner vs. N. Y. Life Ins. Co., (Kansas City, 1938) 114 S. W. 2d 167 ..... 9, 14, 27

Stoner vs. New York Life Insurance Company, 90 S. W. 2d 784 ..... 3, 6

Stoner vs. New York Life Insurance Company, 114 S. W. 2d 167 ..... 3, 6

Taplinger vs. Northwestern Natl. Bank, (C. C. A. 3) 101 F. 2d 274, l. c. 278 ..... 8, 21

Wall vs. Casualty Co., (St. Louis, 1905) 111 Mo. App. 504 ..... 9, 27, 33

Young vs. Metropolitan L. Ins. Co., (Springfield, 1935) 84 S. W. 2d 1065 ..... 10, 28

STATUTES

R. S. Mo., 1929, Sec. 1914 16

Blank Page

Supreme Court of the United States

No. _____

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

The petition of Lewis K. Stoner respectfully shows to this court that:

1. Petitioner seeks to review the final decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit in an action at law for a declaratory judgment, reversing the judgment of the District Court of the United States, for the Western District of Missouri in favor of petitioner, with directions to enter a declaratory judgment in favor of respondent (*New York Life Ins. Co.* v. *Stoner*, 109 F. 2d 874).

The judgment below was rendered February 19, 1940, and the petition for rehearing denied March 22, 1940.

2. On different dates prior to June 29, 1931, respondent delivered to petitioner in Missouri, where they were applied for and where the premiums were paid (Rec. 25), four policies, identical (save as to beneficiaries and the amounts payable at death), by which it agreed to pay petitioner in Missouri stipulated monthly income benefits during the period of continuous total and presumably permanent disability resulting from accident or disease. Each policy provided that "disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation or from engaging in any business for remuneration or profit" (Rec. 21-25).

3. On June 29, 1931, petitioner was accidentally injured (Rec. 6). Prior to the institution of this action, petitioner instituted a suit in the Circuit Court of Buchanan County, Missouri, against respondent on the four policies, to recover disability benefits claimed by him to be due for total disability during the period intervening between September 29, 1933, and March 29, 1934, on account of that accident (Rec. 7). Thereafter, and before the beginning of this action, petitioner instituted two additional suits, one in said circuit court on two of the policies and one in the Circuit Court of Platte County, Missouri, on the remaining two policies to recover disability benefits claimed by him to be due on account of the same accident for the period inter-

vening between April 29, 1934, and May 29, 1936 (Rec. 7). The Buchanan County and the Platte County (removed to Daviess County) cases were tried. Both were appealed to the Kansas City Court of Appeals. The facts shown in the record in both cases were the same. The sole defense was that petitioner was not "totally disabled" within the meaning of the policies; and on both appeals respondent insisted that a demurrer to the evidence should have been given, because there was no substantial testimony sufficient to sustain a finding of total disability and because the testimony showed affirmatively and conclusively that petitioner was not totally disabled within the meaning of the terms of the policies. In both cases the Kansas City Court of Appeals held upon the authority of an unbroken line of Missouri cases covering a period of more than a third of a century, that (a) the policies were not to be construed literally, and to be totally disabled within the meaning of the policies it was not necessary that the insured should be rendered utterly helpless and unable to do and perform any act or acts in connection with his occupation, but that if he were unable to substantially perform the material duties connected with his occupation in the customary and usual manner, then he was totally disabled; and (b) that the evidence was sufficient to sustain the finding that the insured was totally disabled (Buchanan County case, *Stoner* v. *New York Life Insurance Company*, decided January 27, 1936, 90 S. W. 2d 784; Daviess County case, *Stoner* v. *New York Life Insurance Company*, decided January 31, 1938, 114 S. W. 2d 167).

4. On February 21, 1936, respondent applied to the Supreme Court of Missouri for a writ of certiorari to review and quash the opinion of the Kansas City Court of Appeals in the *Buchanan* County case, on the ground the terms of the policies were plain and unambiguous and in construing them the Kansas City Court of Appeals had exceeded its lawful jurisdiction in that it failed and refused to follow the last controlling decisions of the Supreme Court in *State ex rel. Mutual Benefit Association* v. *Trimble*, 334 Mo. 920; *Prange* v. *International Life Insurance Company*, 329 Mo. 651; and *State ex rel. Commonwealth Casualty Company* v. *Cox*, 322 Mo. 38, wherein the Supreme Court held that where the language of the policy of insurance is without ambiguity, there is no room for construction but the unequivocal language is to be given its plain meaning (copy of petition and suggestions in support shown in appendix to supporting Brief, identified as "A"). The Supreme Court denied the writ (copy of judgment shown in appendix to supporting Brief identified as "B").

5. On January 8, 1938, respondent filed this action at law for a declaratory judgment, alleging in the petition there was an existing controversy between it and petitioner involving more than $3,000.00, as follows: Petitioner was claiming that as the result of the accidental injury heretofore mentioned, he was totally disabled during the period intervening between May 29, 1936, and January 7, 1938, and respondent was liable to him on the four policies heretofore mentioned for

disability benefits accrued during that period, amounting to $2,375.00; and respondent also was claiming and demanding repayment of premiums amounting to $790.70 paid by him on the policies during the same period, in all the sum of $3,165.70, while respondent claimed petitioner was not totally disabled and for that reason denied it was liable to him either for the disability benefits or the premiums paid (Rec. 2, 8). The answer denied there was an existing controversy involving more than $3,000.00 and for that reason denied the jurisdiction of the court (Rec. 9, 15). The answer admitted there was an existing controversy with respect to respondent's liability for the accrued disability benefits amounting to $2,375.00 and alleged that was the sole controversy. The answer specifically denied petitioner was claiming or demanding or ever had claimed or demanded repayment of the $790.70 premiums paid and denied there was then or ever had been any controversy with respect thereto (Rec. 15).

6. A jury was waived (Rec. 20). The parties stipulated that either party might introduce in evidence any of the evidence or documents contained in the printed transcript of the record in either of the two Stoner cases above mentioned in the Kansas City Court of Appeals with the same effect as if the testimony were given by the witness on the witness stand, the same evidence read from one record not to be offered from the other (Rec. 21). To sustain its case, respondent introduced and relied only on the evidence contained in the transcript of the record in the Daviess County

case which appears on pages 25-73 of the record. A comparison of the facts in that record, with the facts stated by the court in the Buchanan County case (90 S. W. 2d 784) shows that the evidence in both cases is the same and the court in the Daviess County case so stated (114 S. W. 2d 168).

7. Respondent made no effort to prove, and there is no evidence in the record to show petitioner ever claimed or demanded payment of the $790.70 premiums paid by him or that there was or ever had been any controversy as to his right thereto (see Record). At the close of respondent's case, petitioner moved the court to refuse the declaratory judgment because respondent had failed to prove the actual controversy involved the jurisdictional amount of $3,000.00 (Rec. 73-74). The court reserved ruling on the motion (Rec. 74). At the close of the case the court found:

> "From May 29, 1936, until January 7, 1938, the defendant (petitioner) was totally and presumably permanently disabled by reason of the injury received by him June 29, 1931" (Rec. 102).
> Judgment was rendered accordingly.

8. On appeal, three separate opinions were filed in the court below, the majority holding that the court was not bound by the decisions of the Kansas City Court of Appeals in *Stoner* v. *New York Life Ins. Co.*, 90 S. W. 2d 784, and *Stoner* v. *New York Life Ins. Co.*, 114 F. 2d 167, holding that the evidence was sufficient to warrant the finding of total disability; nor was it bound by like decisions of any of the courts of appeals

of the state; that there was no controlling decisions of the state Supreme Court; that there was no evidence to sustain the finding of the district court; that the policies were plain and unambiguous and not open to construction and that the evidence conclusively showed that petitioner was not totally disabled. The judgment of the district court was reversed, and, without any evidence to prove the jurisdictional amount, that court was ordered to render a declaratory judgment as prayed. Thomas, circuit judge, dissented on the ground the evidence amply sustains the finding of the district court, and that the Missouri law was misinterpreted or ignored in the majority opinion. Van Valkenburgh (circuit judge) filed a separate opinion because "the matter is of such importance not only to the soundness of insurance contracts, but to the integrity of contract construction generally, that I have felt impelled to add my expressed concurrence in Judge Dewey's excellent opinion, and disposition of the cause." He held that the language of the policies was plain and unambiguous and not open to construction (*New York Life Ins. Co.* v. *Stoner*, 109 F. 2d 874).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(a) This case involves the question: What constitutes the "law of the state" within the meaning of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. Because the interpretation of the Erie case by the court below has resulted in a decision in the eighth circuit in con-

flict with decisions in other circuits on the same matter, an authoritative decision by this court is of pressing importance.

The court below erroneously held that it was bound to look only to the decisions of the Supreme Court of Missouri to ascertain the law of the state; that the Missouri courts of appeals were "intermediate courts" and in determining what is "the law of the state" within the meaning of the Erie case it was not bound to follow the decisions of those courts; and it refused to follow them. The decision misinterprets and is in conflict not only with the Erie case but also with decisions on the same matter by the second, third, seventh and ninth circuits.

Second Circuit:

In re Kountze Bros., City of Los Angeles v. *Irving Trust Co.*, 103 F. 2d 785, l. c. 789.

Third Circuit:

Berlet v. *Lehigh Valley Silk Mills*, 287 Fed. 769.

Taplinger v. *Northwestern Natl. Bank*, 101 F. 2d 274, l. c. 278.

North Philadelphia Trust Co. v. *Smith*, 13 F. 2d 585.

Masino v. *West Jersey & S. R. R. Co.*, 41 F. 2d 645.

Ex parte Zimmerman, 48 F. 2d 76.

Seventh Circuit:

In re Gilligan, Troy Wagon Works Co. v. *Hancock*, 152 Fed. 605.

Ninth Circuit:

Curreri v. *Vice*, 77 F. 2d 130.

John T. Porter Co. v. *Java Cocoanut Oil Co.*, 4 F. 2d 476.

And likewise the decision below is in conflict with the utterances of this court.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, l. c. 209.

Blair v. *Com. of Internal Revenue*, 300 U. S. 5-14.

Erie Railroad Co. v. *Hilt*, 247 U. S. 97.

Erie Railroad Co. v. *Duplak*, 286 U. S. 440-444.

Hudson et al., Exrx., v. *Moonier*, 304 U. S. 397.

(b) The court below has erroneously decided an important question of local law not only directly contrary to the decisions of the Kansas City Court of Appeals in actions between the same parties on the same subject and on identical facts, but also contrary to the settled law of the state declared with unanimity by its three courts of appeals (Kansas City, St. Louis and Springfield) in an unbroken line covering more than a third of a century.

Stoner v. *N. Y. Life Ins. Co.*, (Kansas City, 1936) 90 S. W. 2d 784.

Stoner v. *N. Y. Life Ins. Co.*, (Kansas City, 1938) 114 S. W. 2d 167.

Wall v. *Casualty Co.*, (St. Louis, 1905) 111 Mo. App. 504.

James v. *Casualty Co.*, (Kansas City, 1905) 113 Mo. App. 622.

Fogelsong v. *Modern Brotherhood of America*, (Kansas City, 1906) 121 Mo. App. 548.

Katz v. *Union Central Life Ins. Co.*, (Kansas City, 1931) 226 Mo. App. 618.

Rickey v. *N. Y. Life Ins. Co.*, (St. Louis, 1934) 229 Mo. App. 1226.

Kane v. *Metropolitan Life Ins. Co.*, (Springfield, 1934) 228 Mo. App. 649.

Young v. *Metropolitan L. Ins. Co.*, (Springfield, 1935) 84 S. W. 2d 1065.

Moss v. *Metropolitan L. Ins. Co.*, (St. Louis, 1935) 230 Mo. App. 70.

Barton v. *Metropolitan L. Ins. Co.*, (St. Louis, 1937) 103 S. W. (2d) 889.

Pogue v. *Metropolitan L. Ins. Co.*, (St. Louis, 1937) 107 S. W. 2d 144.

Burns v. *Aetna Life Ins. Co.*, (St. Louis, 1939) 123 S. W. 2d 185, l. c. 191.

Heald v. *Aetna Life Ins. Co.*, (Kansas City, 1935) 90 S. W. 2d 797; affirmed 340 Mo. 1143.

(c) The decision of the court below is erroneous in that it ignores and fails to follow the decisions of the Supreme Court of Missouri approving and citing as authority the decisions of the courts of appeals and promulgating the identical rule of law to determine "total disability" announced by those courts.

Heald v. *Aetna Life Ins. Co.*, 340 Mo. 1143, affirming Kansas City Court of Appeals in *Heald* v. *Aetna Life Ins. Co.*, 90 S. W. 2d 979.

State ex rel. v. *Hostetter*, 338 Mo. 589, reviewing on certiorari decision St. Louis Court of Appeals in *Moss* v. *Metropolitan Life Ins. Co.*, 230 Mo. App. 70.

State ex rel. v. *Allen*, 337 Mo. 525, reviewing on certiorari decision of Springfield Court of Appeals in *Kane* v. *Metropolitan Life Ins. Co.*, 228 Mo. App. 649.

(d) In ruling that the policies are plain and unambiguous and not open to interpretation, the decision

of the court below is erroneous and in conflict with the decisions of the Supreme Court of Missouri as well as the decisions of all of its courts of appeals. It failed to follow:

State ex rel. New York Life Ins. Co. v. *Shain* (see Appendixes A and B).

State ex rel. Metropolitan Life Ins. Co. v. *Allen*, 337 Mo. 525, 85 S. W. 2d 469.

State ex rel. Metropolitan Life Ins. Co. v. *Hostetter*, 338 Mo. 589, 92 S. W. 2d 122.

Bellows v. *Travelers Ins. Co.*, 203 S. W. 978.

(e) The majority opinion as to the facts is opposed to the undisputed facts in the record and its conclusion upon the facts stated is erroneous and contrary to the decisions of the Missouri cases.

(f) Without any evidence to show that the amount in controversy exceeded the jurisdictional amount which was put in issue by the answer the court below erroneously directed the district court to enter a declaratory judgment as prayed in favor of respondent. In so doing the court below disregarded the decisions of this court in *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178; *Kvos* v. *Associated Press*, 299 U. S. 269.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Circuit Court of Appeals for the Eighth Circuit be reversed by this Honorable Court, and your petitioner have such

other and further relief in the premises as to this Honorable Court may seem meet and just.

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

I hereby certify that the foregoing petition, in my opinion, is well founded and entitled to the favorable consideration of the court, and that it is not filed for the purpose of delay.

KENDALL B. RANDOLPH,
Counsel for Petitioner.

BRIEF AND ARGUMENT.

ERRORS RELIED UPON.

The court below erred:

I.

In refusing to follow the state law as declared both by the Supreme Court and courts of appeal of Missouri, as well as the utterances of this court and the circuit courts of appeal.

II.

In deciding an important question of local law contrary to the decisions of the Supreme Court and courts of appeals of Missouri.

III.

In holding the policies unambiguous contrary to the decisions of the state courts.

IV.

In misstating the facts and misinterpreting the law of Missouri.

V.

In directing judgment in favor of respondent without any evidence as to the jurisdictional amount.

I.

It is admitted that all of the policies were applied for and delivered and the premiums paid in Missouri (Rec. 25). The interpretation of the policies and the rights of the parties thereunder therefore are governed by the law of that state.

Mutual Life Ins. Co. v. *Johnson*, 293 U. S. 335, 79 L. Ed. 398.

Northwestern Mutual Life Ins. Co. v. *McCue*, 223 U. S. 234, 56 L. Ed. 419.

Cravens v. *New York Life Ins. Co.*, 148 Mo. 583, (Aff.) 178 U. S. 583.

Myers v. *Ocean Acc. Corp.*, 99 F. 2d 485, l. c. 488.

New York Life Ins. Co. v. *Levin*, 102 F. 2d 403, 405.

And whether the evidence is sufficient to make a case must be determined by the laws of Missouri.

Shaw v. *U. S. Fidelity & G. Co.*, 101 F. 2d 92, l. c. 96.

II.

This action seeks only the determination of a legal right, *i. e.*, whether the respondent is indebted to petitioner in the sum of $3,165.70. It, therefore, is an action at law and the court below was bound by the finding of total disability made by the trial court if there is any substantial evidence to support it. In such

circumstances it is not the province of the court below to make its own finding.

State Farm Mutual Auto Ins. Co. v. *Coghran*, 303 U. S. 485, 82 L. Ed. 970.

III.

The decision of the Kansas City Court of Appeals in Stoner v. New York Life Insurance Company, 90 S. W. 2d 784, and in Stoner v. New York Life Insurance Company, 114 S. W. 2d 167, interpreting the policies and holding the evidence is sufficient to sustain a finding of total disability is the law of Missouri controlling on the federal courts; and the decision of the court below to the contrary is erroneous and in conflict with the utterances of this court and the decisions of the Second, Third, Seventh and Ninth Circuit Courts of Appeals.

The decision of the majority of the court below that there was no substantial evidence to support the finding of total disability made by the trial court and that the evidence conclusively shows petitioner was not totally disabled is directly contrary to the decision of the Kansas City Court of Appeals in *Stoner* v. *New York Life Insurance Company*, 90 S. W. 2d 784, and *Stoner* v. *New York Life Insurance Company*, 114 S. W. 2d 167, which the court below erroneously decided was not binding upon it and which it expressly refused to follow.

The decisions of the Kansas City Court of Appeals in the Stoner cases interpret the identical policies. The evidence in those cases and in the case at bar is identical, as a comparison of the evidence in the records with the facts stated in the Buchanan County case will show.

In fact the evidence in the instant case was read from the transcript of the record in those cases. If those decisions are "the law of the state" within the meaning of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, then the court below erred in refusing to follow them.

The majority of the court below erroneously ruled that "the law of the state" within the meaning of the Erie case is the law declared by the Supreme Court of Missouri only; that it was not bound by the decisions of the Missouri courts of appeals which were termed "intermediate appellate courts"; and that as the state Supreme Court had not construed the terms contained in the policies here involved, the court below could, and it did, refuse to follow the decisions of the state courts of appeals. In a word: The ruling is that in the absence of a controlling decision of the state Supreme Court, there is no "law of the state" within the meaning of the Erie case. And this, though the decisions in the *Stoner Cases, supra*, as will presently appear, declare the same rule of law announced with one accord in an unbroken line of cases by all the courts of appeals in Missouri for more than one-third of a century, and they have been approved and followed by the state Supreme Court.

IV.

In the absence of a contrary controlling decision of the state Supreme Court, the courts of appeals in Missouri declare the law of the state.

(a) The Missouri courts of appeals are not "intermediate appellate courts." Their decision is final. From

them there is no appeal. Even though the decision of one court of appeals is in conflict with that of another, the Supreme Court has no jurisdiction to determine that conflict unless the case last decided is certified by the court of appeals itself to the Supreme Court for a determination of the conflict. The Supreme Court cannot compel certification. The Kansas City and St. Louis Courts of Appeals were created by the state constitution and the Springfield Court of Appeals by constitutional authority. *They are courts of last resort as to all cases within their jurisdiction,* which extends, in civil cases, to controversies where the amount in dispute does not exceed $7,500.00 (R. S. Mo., 1929, Sec. 1914). They may not render a decision in conflict with a prior decision of the Supreme Court; but it is only when they exceed their jurisdiction in that respect that their decision may be controlled by the Supreme Court on certiorari. The conflict between decisions of courts of appeals cannot be determined even on certiorari (*State ex rel. Packing Co.* v. *Reynolds*, 287 Mo. 697, l. c. 710). If there be no prior contrary decisions of the Supreme Court, the decisions of any of the three courts of appeals, right or wrong, are conclusive even upon the Supreme Court on certiorari and upon all *nisi prius* courts. In such circumstances they are the highest courts of the state.

State ex rel. Winters v. *Trimble*, 315 Mo. 1295, l. c. 1301.

State ex rel. Security Insurance Co. v. *Trimble*, 318 Mo. 173, l. c. 178.

Fairchild v. *Lohman*, 13 F. 2d 252, l. c. 254.

In *State ex rel. Security Insurance Company* v. *Trimble, supra,* the Supreme Court said:

> "The Kansas City Court of Appeals, with respect to controversies over which it has jurisdiction, is a court of last resort, with power to finally determine a case whether its judgment be right or wrong, except only to certification, or the issuance of a writ of certiorari when its judgment is deemed in conflict with the last previous rulings of this court on the subject."

In *State ex rel. Winters* v. *Trimble, supra,* the Supreme Court said:

> "It may be said in passing that the court of appeals, under the constitution of this state, when acting within the sphere of its jurisdiction, is a court of final resort and its judgments are conclusive on this court, when reviewed by certiorari, except in those cases where it appears that the rulings of said court are in conflict with some prior and controlling decision of this court on the same or similar facts. In *State ex rel.* v. *Allen,* 256 S. W. 1. c. 1052, in speaking of the court of appeals, we said: 'As long as said court promulgated no rule of law which could be said to conflict with a former ruling of this court on the same or similar facts, it had the inherent right to determine the issues involved, whether its ruling be right or wrong."

In *Fairchild* v. *Lohman, supra,* Judge Reeves, D. J., said:

> "Counsel for the ancillary administrator admits that the rule, as above announced, prevails in the courts of appeals in Missouri, but says that the federal court should not follow such ruling, because said courts are not the highest court of the state.

> The federal rule cannot be so interpreted. The obligation to follow the state rule arises if 'the court to be followed is the court of *last resort* in the state' * * * the courts of appeals in Missouri are not intermediate tribunals, but are courts of last resort. Supervisory control over said courts by the Supreme Court is limited to those cases where there may be a refusal to follow the later decisions of the supreme tribunal."

(b) Even before the Erie case, the federal courts did not hold they were uncontrolled by the decisions of state appellate courts on matters of general law because those decisions did *not* declare the law of the state in the absence of a controlling decision of a higher court, but because, though they *did* declare the law of the state, the federal courts were not bound by the state law, and were free to apply the "federal general common law" as they conceived it. And where the statutory law of the state (by which the federal courts were bound) was to be applied, those courts recognized as the law of the state the construction put upon the statute by uniform decisions of intermediate appellate courts in the absence of a contrary controlling ruling by a higher state court.

In *Erie Railroad Co.* v. *Hilt*, 247 U. S. 97 (decided in 1918), the Supreme Court of Pennsylvania, not the highest court of that state, had construed the applicable Pennsylvania statute in *Barcolini* v. *Atlantic City S. R. Co.*, 82 N. J. L. 107. The Third Circuit Court of Appeals refused to follow that case because it was not a decision of the highest court of Pennsylvania (*Erie R. Co.*

v. *Hilt*, 246 Fed. 800). This court reversed the court below, saying:

> "The words of the statute seem to us to require a different construction from that adopted and they have been given their full literal meaning by the Supreme Court of the state in the case of the infant younger than the plaintiff. *Barcolini* v. *Atlantic City & S. R. Co.*, 82 N. J. L. 107. In view of the importance of that tribunal in New Jersey, although not the highest court in the state, we see no reason why it should not be followed by the courts of the United States, even if we thought its decision more doubtful than we do."

In 1923, the Third Circuit Court of Appeals in *Berlet* v. *Lehigh Valley Silk Mills*, 287 Fed. 769, said:

> "Jurisdiction in this case is based solely on the ground of diversity of citizenship. We are therefore administering Pennsylvania law, and not federal law. The general rule of law is that, when no federal question is involved, and when the law, common or statutory, involved is not general, and has become established as a part of the law of the state, a federal court will follow the decisions of the state court of last resort. *Snare & Triest Co.* v. *Friedman*, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367 (certiorari denied 214 U. S. 518, 29 S. Ct. 700, 53 L. Ed. 1065); *Public Service Co.* v. *Wurtsthorn et al.*, (C. C. A.) 278 Fed. 408. While the Superior Court of Pennsylvania is not the court of last resort in that commonwealth, it is a tribunal of such importance that this court will follow its decision construing this statute. *Erie Railroad Co.* v. *Hilt*, 247 U. S. 97, 100, 38 S. Ct. 435, 63 L. Ed. 1003."

In 1906, the Seventh Circuit Court of Appeals, in *In re Gilligan, Troy Wagon Works Co.*, v. *Hancock*, 152 Fed. 605, said:

> "Under the statute creating the Indiana Appellate Court (Section 10, Indiana Acts, 1901, page 567, Chapter 247), it is provided that the jurisdiction of the appellate court shall be final, except in the event that the case is transferred to the Supreme Court; or in case that the Supreme Court, upon application, shall order the case certified to it; or in cases involving a sum exceeding six thousand dollars.
>
> "*West* v. *Fulling* was the interpretation, by the appellate court, of the law of Indiana. It purported to declare the law in the light of the previous declarations of the Supreme Court, as far as those decisions went. Unquestionably, it was an interpretation, the appellate court decision being in fact final, that the *nisi prius* courts of Indiana would feel bound to follow; for whatever may be the limitation on the rights of the appellate court, contrary to the judgment of the Supreme Court, to change the interpretation of Indiana law, the decision in *West* v. *Fulling* cannot be said to be plainly contrary to the decisions of the Supreme Court. The most that could be said would be that the appellate court, seeking to follow the decisions of the Supreme Court, had possibly misinterpreted them—an assumption that would not relieve the *nisi prius* courts of Indiana, or the United States District Court sitting for that district, from the duty of following the decision. Upon the authority of *West* v. *Fulling*, therefore, unmolested by the Supreme Court of Indiana, we feel ourselves bound to affirm the order appealed from."

In 1926, the Third Circuit Court of Appeals in *North Philadelphia Trust Co.* v. *Smith*, 13 F. 2d 585, after

citing a number of decisions of the Supreme Court of New Jersey (not the highest court of the state) said:

> "Beginning long ago with *Cumberland Bank* v. *Hall*, 6 N. J. Law 215, passing through *Den* v. *Wright*, 7 N. J. Law 175, and *Hunt* v. *Gray*, 35 N. J. Law 227, and running to *Hoey* v. *Jarman*, 39 N. J. Law 523, and *Johns* v. *Crawley*, 57 N. J. Law 222, New Jersey courts have uniformly declared that whether an alteration in a promissory note or other instrument was made after or before execution is a question for the jury. The subject was discussed at length by Chief Justice Beasley in *Hunt* v. *Gray*, *supra*. * * * This was a decision by the Supreme Court of New Jersey, not by the court of errors and appeals. That court, however, though not the highest court of the state, is in the estimation of the Supreme Court of the United States, as shown in *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97, 100, of such standing as to compel the courts of the United States to follow its pronouncements."

In 1925, the Third Circuit Court of Appeals in *Toplinger* v. *Northwestern Nat. Bank*, 101 F. 2d 275, held that it was bound by the decision of the Superior Court of Pennsylvania in *Kaufman & Baer* v. *Monroe Motor Line Co.*, 124 Pa. Super. 27, which was not the highest court in the state. The court said:

> "However, since it (the question) was squarely raised by the facts of the Kaufmann & Baer case, the decision in that case amounts to a construction of the statute by a Pennsylvania appellate court of high authority which we must accept as binding upon us, even though if the matter were open for our consideration a different conclusion might well be reached."

In *Masino* v. *West Jersey & S. S. R. Co.*, 41 F. 2d 645, Third Circuit, the court said:

> "We quote all the pertinent part of this short opinion because, in so far as we have been informed, it is the first case on the statute in New Jersey, and for the reason that in succeeding cases, decided by the Supreme Court of that state, which, though an intermediate appellate tribunal, is of sufficient importance to compel observations of its decisions, *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97, the principal seems not to have been closely followed."

The court of appeals decided the case upon the rulings of the Supreme Court of New Jersey.

In *Ex parte Zwillman*, 48 F. 2d 76, Third Circuit, the court said:

> "In the case of *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97, where a construction was placed by this court upon a statute of New Jersey in the absence of its construction by the court of errors and appeals, the highest court of the state, Mr. Justice Holmes, in an opinion reversing the judgment of this court (246 Fed. 800), said: 'The words of the statute seem to us to require a different construction from that adopted, and they have been given their full literal meaning by the Supreme Court of the state in the case of an infant younger than the plaintiff. *Barcolini* v. *Atlantic City & Shore R. R. Co.*, 82 N. J. Law 107. In view of the importance of that tribunal in New Jersey, although not the highest court in the state, we see no reason why it should not be followed by the courts of the United States, even if we thought its decision more doubtful than we do.'"

In the Ninth Circuit, *Curreri* v. *Vice*, 77 F. 2d 130, the court said:

"The question of whether or not we are bound to follow the decision of an intermediate appellate court such as the District Court of Appeal of California, interpreting the statutory law of the state, is a matter upon which there has been some difference of opinion. See opinion by Circuit Judge Hand, *Irving Nat. Bank* v. *Law*, 9 F. 2d 536; *In re Gilligan*, 152 Fed. 605; *John T. Porter Co.* v. *Java Cocoanut Oil Co.*, 4 F. 2d 476, by this court. The Supreme Court, in *Erie R. Co.* v. *Hilt*, 247 U. S. 97, 38 S. Ct. 435, 436, 62 L. Ed. 1003, said: 'In view of the importance of that tribunal (Supreme Court) in New Jersey, although not the highest court in the state, we see no reason why it should not be followed by the courts of the United States, even if we thought its decision more doubtful than we do.'

"Upon this ground the Supreme Court reversed a decision of the Circuit Court of Appeals of the Third Circuit (246 Fed. 800) which, in dealing with a case arising in New Jersey, had declined to follow the decisions of the Supreme Court of New Jersey. See, also, *Ex parte Zwillman*, (C. C. A.) 48 F. 2d 76, 78. It is unnecessary for us to determine whether or not we are bound to follow the decision of the California District Court of Appeal *In re Schwitalla, supra*, for we think the decision is right."

(c) If, before the Erie case, the decisions of the state appellate courts were binding upon the federal court as declaring the law of the state in the construction of its statute law, certainly such decisions, since the Erie case, declare the general law of the state in the absence of a contrary decision by a higher court. If there be no decision of a higher court, where must the federal court look for the law of the state? The Erie case says the law of the state is the law declared by "the state courts." What state courts?

This court in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, l. c. 209, said:

> "The application of the 'state law' to the present case, or any other controversy controlled by *Erie R. Co.* v. *Tompkins*, does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body or substantive law governing an identical action in the state courts. Heretofore, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state courts, and just as they have always done in actions brought in the federal courts involving what were known as matter of 'local' law."

And, in *Hudson* v. *Moonier*, 304 U. S. 397, this court said:

> "A federal court, in determining the liability of the driver and lessor of a truck not equipped with a horn or other signaling device, to one struck by it, *should apply the law which would have been applied had the action been brought in a state court*" (italics ours).

In the second circuit, *In re Kountze Bros., City of Los Angeles* v. *Irving Trust Co.*, 103 Fed. 785 (decided after the Erie case), the court held that the New York law applied and said it "considered controlling" among others the decision of the appellate division in *Staten Island Cricket & Baseball Club* v. *Farmers Loan & Trust Co.*, 58 N. Y. S. 460.

If this case were tried in the Missouri state court, what law would be applied? In the absence of a con-

trary decision by its Supreme Court, it would be the law as declared by its courts of appeals. In this particular case the decisions in the Stoner cases would govern not only because they declare the law of Missouri but because on an identical record in actions between the same parties, the identical question has been decided *stare decisis.*

State v. *Fidelity & Deposit Co.*, 99 S. W. 2d 476, l. c. 478.

Moreover, for 35 years, in some cases where the policies were identical, and in other cases where the policies are substantially the same, all of the Missouri Courts of Appeals, St. Louis, Kansas City and Springfield, have announced the same rule of law. It is no longer an open question in Missouri.

In *Burns* v. *Aetna Life Ins. Co.*, 123 S. W. 2d 185, where the policy provided for disability payments if the insured were "unable to engage in any occupation or employment for wage or profit" and where it was claimed a demurrer to the evidence should have been given because it was shown plaintiff did perform some of his duties, the court said:

> "As to the law of Missouri, it is well settled in this state that it is sufficient to make a question to be submitted to the triers of the fact if it be shown that the insured is suffering from an infirmity or a disease which renders him unable to perform in the usual and customary way all of the material acts of any occupation, business or profession that he would be able to engage in except for his disabling infirmity or disease."

In support of the ruling the court cites cases decided by the state Supreme Court as well as the courts of appeals.

In *Pogue* v. *Metropolitan Life Ins. Co.*, 107 S. W. 2d 145, where the provisions of the policy involved are *identical* with those in the case at bar, and the facts very similar, the court laid down the same rule of law and reached the same conclusion as the court did in the two Stoner cases and held the question of total liability was one of fact to be determined by the triers of the fact and said:

> "*It is no longer a debatable question in this state* that the provisions of a policy insuring against total and permanent disability such as those involved in this case are to be given a liberal one and not a literal one. * * * It is sufficient to make it a question to be submitted to the triers of the fact if it be shown that the insured is suffering from an infirmity or a disease which renders him unable to perform in the usual and customary way substantially all of the material acts of any occupation, business or profession, that he would be able to engage in, except for his disabling infirmity or disease" (italics ours).

The two cases recognized by the Supreme Court as leading cases in Missouri are *Fogelsong* v. *Modern Brotherhood of America*, 121 Mo. App. 548, and *James* v. *Casualty Company*, 113 Mo. App. 622. The facts in those two cases are remarkably like the facts in the case at bar. Those cases have been expressly approved

and followed by the Supreme Court *as the leading cases in this state.*

Bellows v. *Travelers Ins. Co.*, 203 S. W. 978.
Heald v. *Ins. Co.*, 340 Mo. 1143, l. c. 1150.

Judge Dewey, in the court below, attempted to distinguish the Heald case, saying the policy there was an occupational policy. It is difficult to conceive how the same words could mean one thing when used in an occupational policy and have a different meaning when used in a policy not occupational. It is certain that the Supreme Court of Missouri recognized no distinction because in reaching its conclusion that court cited and followed the decisions of the courts of appeals where the policies are not occupational.

The court below therefore erred in refusing to follow the Stoner cases and the long line of harmonious decisions of the three courts of appeals declaring the settled law of the state which have been approved and followed by the state Supreme Court.

Stoner v. *N. Y. Life Ins. Co.*, (Kansas City, 1936) 90 S. W. 2d 784.
Stoner v. *N. Y. Life Ins. Co.*, (Kansas City, 1938) 114 S. W. 2d 167.
Wall v. *Casualty Co.*, (St. Louis, 1905) 111 Mo. App. 504.
James v. *Casualty Co.*, (Kansas City, 1905) 113 Mo. App. 622.
Fogelsong v. *Modern Brotherhood of America*, (Kansas City, 1906) 121 Mo. App. 548.
Katz v. *Union Central Life Ins. Co.*, (Kansas City, 1931) 226 Mo. App. 618.

Rickey v. *N. Y. Life Ins. Co.*, (St. Louis, 1934) 229 Mo. App. 1226.

Kane v. *Metropolitan Life Ins. Co.*, (Springfield, 1934) 228 Mo. App. 649.

Young v. *Metropolitan L. Ins. Co.*, (Springfield, 1935) 84 S. W. 2d 1065.

Moss v. *Metropolitan L. Ins. Co.*, (St. Louis, 1935) 230 Mo. App. 70.

Barton v. *Metropolitan L. Ins. Co.*, (St. Louis, 1937) 103 S. W. 2d 889.

Pogue v. *Metropolitan L. Ins. Co.*, (St. Louis, 1937) 107 S. W. 2d 144.

Burns v. *Aetna Life Ins. Co.*, (St. Louis, 1939) 123 S. W. 2d 185, l. c. 191.

Heald v. *Aetna Life Ins. Co.*, 340 Mo. 1143, affirming Kansas City Court of Appeals in *Heald* v. *Aetna Life Ins. Co.*, 90 S. W. 2d 797.

State ex rel. v. *Hostetter*, 338 Mo. 589, reviewing on certiorari decision St. Louis Court of Appeals in *Moss* v. *Metropolitan Life Ins. Co.*, 230 Mo. App. 70.

State ex rel. v. *Allen*, 337 Mo. 525, reviewing on certiorari decision of Springfield Court of Appeals in *Kane* v. *Metropolitan Life Ins. Co.*, 228 Mo. App. 649.

V.

In ruling that the policies are plain and unambiguous and not open to interpretation, the decision of the court below is erroneous and in conflict with the decisions of the Supreme Court of Missouri as well as the decisions of all of its courts of appeals.

State ex rel. New York Life Ins. Co. v. *Shain*, (see Appendixes A and B).

State ex rel. Metropolitan Life Ins. Co. v. *Allen*, 337 Mo. 525, 85 S. W. 2d 469.

State ex rel. Metropolitan Life Ins. Co. v. *Hostetter*, 338 Mo. 589, 92 S. W. 2d 122.
Bellows v. *Travelers Ins. Co.*, 203 S. W. 978.

The Kansas City Court of Appeals in *Stoner* v. *New York Life Ins. Co.*, 90 S. W. 2d 784, ruled that the policies were open to construction. Thereupon respondent applied to the Supreme Court of Missouri for a writ of certiorari to quash the opinion on the ground the decision that the policies were open to construction was contrary to the decisions of the Supreme Court holding that where the language is unambiguous it must be given its plain meaning and is not open to construction (see Appendix A). The court denied the writ (see Appendix B). Certiorari is a writ of right where the decision of a court of appeals is in conflict with a previous decision of the Supreme Court. The denial of the writ could have been upon no other ground than that the Supreme Court were of opinion that the policies were ambiguous and open to construction; otherwise the decision of the court of appeals construing them would have been clearly in conflict with the previous decisions of the Supreme Court holding that unambiguous contracts were not open to construction, and the writ would have been granted. So that it appears that the Supreme Court has decided that the policies in this case are ambiguous and the court below erred in not following the state law.

In *State ex rel. Metropolitan Life Ins. Co.* v. *Allen*, 337 Mo. 525, 85 S. W. 2d 469, the relator sought on

certiorari to quash the opinion of the Kansas City Court of Appeals in *Kane* v. *Metropolitan Life Ins. Co.*, 73 S. W. 2d 826, on the ground that court had construed the policies which relator claimed were plain and unambiguous and not open to construction, and therefore the decision of the court of appeals was contrary to the prior decisions of the Supreme Court. The sole question, therefore, was whether or not the policy was ambiguous. Its provisions were even more favorable to the insurance company than the provisions in the policies in the instant case. It provided for disability benefits if by reason of accident or disease the insured was "*wholly prevented thereby from performing any work for compensation or profit.*" The Supreme Court ruled the provision was ambiguous, saying:

> "Relator claims that the disability provisions of the certificate are plain, unambiguous, and not open to construction. Based on this claim, the contention is that the construction given such provisions by the court of appeals conflicts with previous decisions of this court which hold that plain and unambiguous language in an insurance policy is not open to construction but such language must be given its plain meaning. Without setting out the cases which relator cites in support of this contention, it may be stated that the uniform holding of this court is that where an insurance policy is open to different constructions, that most favorable to the assured must be adopted. But where the language of the policy is plain and unambiguous, such language must be given its plain meaning. So the question is: Are the provisions of the certificate plain and unambiguous? * * * The language of the policy is that a policyholder is totally and per-

manently disabled when he is permanently, continuously and wholly prevented from performing any work for compensation or profit. Evidently the purpose of one in carrying a policy of insurance providing for total and permanent disability benefits is to have such benefits take the place of his earnings and provide a livelihood for him in case he becomes totally and permanently disabled. * * * If an able-bodied railroad engineer carrying such a policy should lose both legs and one arm and yet be able to sit on the street corner and sell peanuts, shoestrings, or newspapers, for which he would receive some compensation or profit, would he be totally disabled within the meaning of his policy? If the hearing and eyesight of a member of this court should become so defective that he would be unable to perform his judicial duties, but he would yet be able to mow his lawn or hoe his garden, and do like work for his neighbors for a small compensation, would he be totally disabled within the meaning of the policy in question? Does the language of the policy mean that if the insured is able to perform substantially the duties of his occupation he is not disabled? Or does it mean that if he is physically able to perform substantially any work for which he is equipped, he is not disabled? Such an insurance policy is nothing more or less than a contract between the insurance company and the insured. When we keep in mind the evident purpose prompting the parties to enter into such a contract, we know it does not mean that if an injured policyholder is able to do anything whatsoever for any compensation whatsoever, he is not totally disabled. But what does it mean? What does performing work for compensation or profit mean? The language of the policy is not clear and plain. Its meaning cannot be determined except by an authoritative construction. * * * In view of the fact that this court has not construed an insurance policy like or similar to the one here in

controversy, and in view of the further fact that the language of the policy in question is ambiguous, and therefore open to construction, the construction the court of appeals gave the policy is not subject to review by this court on certiorari."

In *State ex rel. Metropolitan Life Insurance Company* v. *Hostetter*, 338 Mo. 589, 92 S. W. 2d 122, the Supreme Court on certiorari reviewed the judgment of the St. Louis Court of Appeals in *Moss* v. *Metropolitan Life Ins. Co.*, 84 S. W. 2d 395. There the policies provided for disability payments if the insured had "become totally and permanently disabled, as the result of bodily injury or disease so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit." The court of appeals held the policy was open to construction and construed it exactly as the Kansas City Court of Appeals construed the policies in the instant case. The sole question was whether the policy was ambiguous. Following the *Allen Case, supra*, the Supreme Court held that it was and quashed its writ of certiorari theretofore issued.

In *Bellows* v. *Travelers Ins. Co.*, 203 S. W. 978, the Supreme Court of Missouri had under consideration a policy providing for disability benefits if the insured became "wholly disabled by injuries * * * from performing any and every kind of duty pertaining to his occupation." The Supreme Court ruled that it was open to construction and held the contract to mean "not that the assured was rendered absolutely and literally unable to perform any part of his occupation, but that

he was disabled from performing substantially the occupation stated in the policy."

It is to be noted that the Supreme Court in that case cited and followed *James* v. *Casualty Co.*, 113 Mo. App. 622 (repudiated by the court below), as "a leading and excellently considered case on this subject" and also followed *Wall* v. *Casualty Company*, 111 Mo. App. 504; *Fogelsong* v. *Modern Brotherhood of America*, 121 Mo. App. 548, which are also repudiated by the court below.

In holding the policies in the instant case were not ambiguous the court below failed to follow the decisions of the Supreme Court of Missouri as well as the courts of appeals as it was required to do by the Erie case.

VI.

In its findings of facts the court below completely disregarded the undisputed evidence and misconstrued the Missouri cases.

Petitioner was and had been all his life a farmer (Rec. 26). The policies stated his occupation to be a farmer and that he contemplated no change (Rec. 24). Respondent proved petitioner had only a common grammar school education and that he had no experience or training in any other business, profession, occupation or avocation and was not equipped to do any work except that of a farmer (Rec. 26). By its own evidence respondent eliminated the ability of petitioner to engage in any work, business or profession other than that of a farmer. It made no effort to prove he could

or ever did engage in any other work. It confined its efforts to proving he was not totally disabled to perform the substantial duties of a farmer and upon that issue alone this case was tried in the district court and decided in the court below.

Judge Dewey in his opinion said:

> "It is true that in transacting some of the details of the business in which the insured has been engaged he is discommoded and slowed up by his injury, but this condition does not prevent him and he is able and does without any excess pain, perform all of the material and substantial duties to carry on the business in which he is now engaged."

And Judge Van Valkenburgh said:

> "It is true that 'the appellant having the burden of proof tried this case on the theory that the insured is engaged in the occupation and business of operating a grain and stock farm'; and so he is. * * * Complainant introduced evidence that established beyond dispute and was undisputed, that appellee was, during the period in question, following an occupation and engaged in a business for remuneration and profit; therefore, within the terms of the disability clause. He was conducting these operations substantially as he did before he was injured, with less physical participation on his part, and with less men employed, and, as he expresses it, with more modern machinery. He does all the substantial and material acts essential on his part to the operation in which he is engaged."

There is no evidence that warrants either statement and the evidence introduced refutes it. Petitioner was engaged in one occupation that required both phy-

sical labor and mental work. It was not only proved but admitted he could do no physical work on a farm (Rec. 88). Mentally he was not affected and he could and did hire others and direct them what to do, though he could not oversee their work. In doing the physical work and directing employees he was not engaged in two occupations; he was performing the correlative duties of one—that of a farmer.

> "He was a farmer in the sense the term is usually understood to express, that is, one who directs the business on a farm and works at farm labor."
>
> *Fogelsong* v. *Modern Brotherhood of America*, 121 Mo. App. 548.
>
> *Heald* v. *Aetna Life Ins. Co.*, 340 Mo. 1103.

Stoner vs. N.Y.Life Ins.Co.,90 S.W.(2)l.c.796-797

His one business was that of cultivating and operating a grain and stock farm. In carrying on that business both physical and mental effort was required. The facts are, as stated in the Stoner cases, in substance, this:

As the result of his injury the bones of his left foot were jerked out of the ankle joint and it became ankylosed and infected. He was in the hospital two months, at home in bed three months, then in a wheel chair for a month. Then he was able to walk on two crutches, then on a crutch and a cane and finally with the aid of a cane. He cannot walk without it, the ankle is stiff and the muscles of the lower leg do not function. He cannot move his toes. He can walk a block or two and if he does or drives a car his leg

swells and hurts him. The injured foot is cold, the ankle joint is three-quarters of an inch larger than the other, his left foot drags and is pointed out. He walks very slowly, with a decided limp (Rec. 26-27). In operating one farm owned and another rented by him, he was required to and he did do the chores, milk, get the teams ready, plow, cut stalks, plant corn, alfalfa, oats and wheat, mow hay, cultivate the ground, harvest the crops, buy and feed livestock, haul them to market and do all of the physical work done on the farm (Rec. 28). And he directed his employees as to the work they were to do, showed them how to do it and inspected it after it was done (Rec. 28-29). Since his injury he has not been able to do any physical work. There is nothing the matter with him mentally, and he is able to employ others to do the work and direct them what to do, but is unable to supervise the work (Rec. 28-29).

Upon this evidence, the majority of the court say that he is substantially performing all of the material duties of his occupation with a little inconvenience to himself. That is saying, as a matter of law, only in other words, that the physical work performed by a farmer is not one of the substantial duties of his occupation. It is not sufficient to show, as the majority of the court below held, that petitioner could do the mental work of an occupation which required both physical and mental effort. It was necessary to prove that the petitioner, in operating the farms, could perform all the substantial duties of that one occupation in the usual and customary manner he did before he was in-

jured. All of the Missouri cases decided both by its Supreme Court and its courts of appeals say that is the law.

In *Equitable Life Assurance Society* v. *Bomar*, 106 F. 2d 640, the Sixth Circuit Court of Appeals, applying the Kentucky law, which is identical with that of Missouri, said:

> "In his application for the policy issued in 1924, the insured gave his occupation and business as a 'hardware dealer.' He stated that he had no other occupation and contemplated no change. The disability clause must be construed in the light of these statements. *Prudential Ins. Co.* v. *Harris*, 254 Ky. 23, 70 S. W. 2d 949, 953; *John Hancock Mut. Life Ins. Co.* v. *Cave*, 240 Ky. 56, 58, 40 S. W. 2d 1004, 79 A. L. R. 848. Appellant knew that it was insuring Bomar against total disability to transact a business requiring not only physical effort but judgment and discretion.
>
> "If the insured was unable either physically or mentally to discharge the important and material duties necessary to the prosecution of his business in substantially his usual and customary manner, he was totally disabled. Such are the holdings generally and the Court of Appeals of Kentucky is in accord."

In order not to prolong this brief, but for the convenience of the court, we quote only from *Fogelsong* v. *Modern Brotherhood of America*, 121 Mo. App. 548, one of the cases which the Missouri Supreme Court has said is a leading case in Missouri.

> "The plaintiff's vocation was that of a farmer, having lived on a farm all of his life. He was at

the time of the trial fifty-seven years of age, and seriously afflicted in his right leg and had been so afflicted for more than three years. The evidence tended to show that the diseased condition of this leg was permanent and that it would be necessary to amputate it. It appears that in September, 1902, the disease began to make its appearance in plaintiff's right leg. From the beginning of the following December he was confined to his bed for a period of three months. After that, the condition of his leg improved so that he could walk upon crutches, and afterwards for a while he walked with the aid of a cane. After July, 1903, he dispensed with medical treatment and applied leaf tobacco to his diseased leg. It was shown that *he directed the work to be done on his farm, and that he performed some labor himself.* He drove the wagon while loading and unloading corn and in hauling coal from the mine. He aided to some extent in cultivating a crop of two thousand bushels of pickles. He plowed some and helped in the cutting and shocking of oats. Notwithstanding plaintiff performed certain farm labor, there was evidence tending to show that he was disabled from performing substantially the occupation of a farmer.

"The defendant contends that, *as the plaintiff was not disabled from directing his sons in carrying on the business of the farm*, and did some of the work himself, his disability was not total. It is also contended that, if he was able to carry on any vocation in life, he had not suffered such total disability as the terms of the policy required in order for him to be entitled to the indemnity claimed. The plaintiff's insurance was not against his disability as a farmer, but such a total disability as would render him unable to carry on or conduct any vocation or calling. It is the defendant's theory that though plaintiff may not be considered a farmer in the strictest sense, that is, capable of doing farm work, yet, if he was capable of conducting farm

work *by direction*, he was not entitled to recover under the terms of his policy. Bacon on Ben. So. & Life Ins., Sec. 595 a, supports that theory. * * *

"But we are unwilling to adopt such a doctrine, the effect of which would be practically to reduce all such contracts to nullities and to make them the instruments of extracting dues from policyholders without creating any liability on the part of the insurers. Common knowledge of the occupations in the lives of men and women teach us that there is scarcely any kind of disability that prevents them from following some vocation or other, except in cases of complete mental inertia. We have examples of persons without hearing and without sight following a vocation—some without feet and some without hands, engaged in business. The achievements of disabled persons are seemingly marvelous. Under defendant's theory, the plaintiff might embark in the peanut trade or follow the business of selling shoestrings or lead pencils or follow some similar calling, in which instances, under the rule invoked, there would be no disability within the meaning of the policy. In our opinion such was not within the contemplation of the parties. In order to carry out the intent of the parties, it is our duty to disregard the broad language used which would have the effect to defeat the purpose of the contract and render it a nullity. * * *

"But it is contended that plaintiff did not show that plaintiff's disability totally prevented him from carrying on the business of a farmer. Notwithstanding an individual in some instances may be a farmer without performing manual labor, the plaintiff was not a farmer in that sense. He was a farmer in the sense the term is usually understood to express, that is, *one who directs the business on a farm and works at farm labor*. The evidence showed that the plaintiff not only, to some extent,

directed the work on his farm, but also labored at farm work. We have some authority in this state as to what constitutes total disability. Where the insured was a brakeman and also a farmer, the evidence showed that after injury he went with his train on two runs, hiring a substitute to do the braking, gave directions about his farm and performed one trivial act of labor. It was held that the question of his total disability was for the jury to determine (*Wall* v. *Casualty Co., supra*). In *James* v. *Casualty Co., supra*, the plaintiff was a wholesale and retail merchant. The evidence was to the effect that, 'he came to his place of business almost daily, when he signed checks, approved orders for goods and dictated letters.' He went on a trip to New York to buy goods, but was unable to do many of the principal matters pertaining to his business. He could not get about the store, but was compelled to sit in his office in a crippled condition. *We held that it was a question for the jury* to determine whether his disability was total. The court, in construing the language of the policy said, 'we therefore hold the contract to mean, not that the assured was rendered absolutely and literally unable to perform *any part* of his occupation, but that he was disabled from performing substantially the occupation stated in the policy.' The opinion is supported by the authorities cited therein.

"Total disability is construed to be a relative term (*McMahon* v. *The Supreme Council*, 54 Mo. App. 468). Kerr on Insurance 385, 386, defines it thus:

> 'Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists, although the insured is able to perform a few occasional acts, if he is unable to do *any substantial por-*

tion of the work connected with his occupation. It is sufficient to prove that the injuries totally disable him from the doing of *all the substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labors so long as was reasonably necessary to effect a speedy cure.'*

"Notwithstanding the evidence detailed proved that plaintiff was able to direct to some extent his business of farming and did some work himself, it tended also to show that he was wholly disabled from doing *all* the substantial and material acts necessary to be done" (italics ours).

The majority opinion simply ignores that case, followed and declared to be a leading Missouri case by the state Supreme Court in *Heald* v. *Aetna Ins. Co., supra*, separates the physical from the mental work required in one occupation, and rules that petitioner is partially but not wholly disabled. That is exactly what the Supreme Court said could not be done in the Heald case.

VII.

In ordering the district court to enter a declaratory judgment as prayed in favor of respondent without any evidence to prove the amount in dispute exceeded $3,000.00, the decision of the court below is erroneous and in conflict with the decisions of this court.

McNutt v. *General Motors Accep. Corp.*, 298 U. S. 178.

Kvos v. *Associated Press*, 299 U. S. 269.

Jurisdiction in this case was based solely on diversity of citizenship and the amount in dispute. The

petition alleged generally that the amount in controversy exceeded $3,000.00 and specifically that the controversy was in regard to $2,375.00 benefits accrued for the period intervening between May 29, 1936, and January 7, 1938, and $790.70 premiums paid (Rec. 8). The answer denied that the controversy involved more than $3,000.00. It admitted an existing controversy with respect to the disability benefits of $2,375.00 and alleged that was the sole controversy. It denied that there was or ever had been any controversy with respect to the premiums paid, $790.70 (Rec. 15). Respondent moved the court to refuse a declaratory judgment because respondent had failed to prove any controversy with respect to the $790.00 and therefore there was no evidence to prove the actual controversy involved the jurisdictional amount of $3,000.00. The trial court reserved ruling on the motion (Rec. 73-74).

Respondent made no effort and there is not a word in the record to prove there was any controversy with respect to $790.70 premiums paid. There is not a word of testimony in the record to prove there ever was any such controversy. The controversy was limited to the $2,375.00 benefits claimed. The burden was upon the respondent to prove the jurisdictional amount, failing which the case should have been ordered dismissed.

In *McNutt* v. *General Motors Accep. Corp.*, 298 U. S. 178, this court said:

> "That allegation (the allegation of the jurisdictional amount) was put in issue and the record discloses neither finding nor evidence to sustain it.

In the absence of any showing in the record to support that general allegation the question is upon which party lay the burden of proof. * * * He (the plaintiff) must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exercised in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. * * * Here, the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegations of the bill. There was thus no showing that the district court had jurisdiction and the bill should have been dismissed upon that ground. The decree is reversed and the cause is remanded to the district court with directions to dismiss the bill of complaint for want of jurisdiction."

In *Kvos* v. *Associated Press*, 299 U. S. 269, the court said:

"But where the allegations as to the amount in controversy are challenged by the defendant in

> an appropriate manner, the plaintiff must support them by competent proof. * * * Since the allegation as to amount in controversy was challenged in appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed."

The judgment of the court below ordering the district court to enter a declaratory judgment as prayed in favor of respondent is therefore erroneous.

In these circumstances this question is presented: If this court should conclude that, under the Missouri law, there is substantial evidence to sustain the finding of the trial court that petitioner was totally disabled during the period for which he claims $2,375.00 disability benefits, should the judgment of the district court in his favor be affirmed or should the cause nevertheless be ordered dismissed because respondent failed to prove the jurisdictional amount?

We submit the judgment should be affirmed because respondent is conclusively bound by the allegations of its petition that more than $3,000.00 is in dispute. Proof of that fact was not necessary so far as *respondent* is concerned to give the court jurisdiction. As to it the jurisdiction of the court conclusively appears from its own allegation which it is not permitted to deny. It may not invoke the jurisdiction of the court, allege the jurisdictional amount is in dispute, try its case and suffer defeat on the merits and then claim either below or here that the judgment below should be set aside and the cause dismissed because it failed to *prove* the jurisdictional fact which it was required to

prove before it could recover a judgment against petitioner. In a word: Suppose respondent should admit in this court that the opinion of the court of appeals in *Stoner* v. *New York Life Insurance Company* was as binding as if the case had been decided by the Supreme Court of Missouri and there was sufficient evidence to sustain the finding of total disability. Would respondent be entitled to have the judgment *against* it set aside and the cause dismissed because its allegation that more than $3,000.00 was in dispute was not supported by proof? Only the defendant, who denies the jurisdictional amount, and, for that reason, the jurisdiction of the court, is entitled to a dismissal for failure to prove the allegation. The other facts warranting it, the court may enter judgment against the plaintiff without proof of jurisdictional amount because plaintiff, having alleged that the jurisdictional amount is in dispute, is not in a position to require proof of a fact which it admits.

VIII.

It is manifest the majority of the court below ruled the case, not upon the Missouri law but upon the law as they thought it should be. Years before any of the policies in this case were issued, the law in Missouri had been settled. That law became a part of each policy as if the law had been written in it. Respondent, when it issued the policies, knew the construction that would be put upon them and voluntarily issued them, assumed the risk and collected the premiums year after year. It should be required to abide by the law of the state.

We respectfully submit the writ should be issued, the cause reviewed and the judgment below reversed.

Respectfully submitted,

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With him on Brief:
R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

APPENDIX A.

IN THE SUPREME COURT OF MISSOURI

September Term, 1935

In the Matter of New York Life Insurance Company, a Corporation, Petitioner,

vs.

Hopkins B. Shain, Ewing C. Bland and Robert M. Reynolds, Judges of the Kansas City Court of Appeals, Respondents.

Application for Certiorari

Petition for Certiorari and Suggestions in Support Thereof.

PETITION FOR CERTIORARI

Comes now New York Life Insurance Company, a corporation, petitioner herein, and applies for a writ of certiorari to quash the record of the Kansas City Court of Appeals in Cause No. 18429 entitled *"Lewis K. Stoner, Appellant, vs. New York Life Insurance Company, a corporation; Respondent,"* and for cause of application, states the following facts, to-wit:

That Hopkins B. Shain, Ewing C. Bland and Robert M. Reynolds compose the Kansas City Court of Appeals of the State of Missouri.

That one Lewis K. Stoner instituted in four counts an action against the New York Life Insurance Company, a corporation, petitioner herein, in the Circuit Court of Buchanan County, Missouri, in April, 1934,

which was subsequently tried in said court in November, 1934; that the plaintiff in said action sought to recover from the petitioner herein, monthly benefits alleged to be due and unpaid, accruing from October, 1933, to March, 1934, inclusive, provided for in four certain policies or contracts of insurance issued by your petitioner, to the plaintiff therein; that each of the contracts of insurance on which plaintiff sought to recover provides that plaintiff should be paid monthly benefits if by reason of bodily injury or disease he became so disabled that he was "wholly prevented from performing any work, from following any occupation or from engaging in any business for remuneration or profit," and further provided in a separate paragraph that as a distinct provision and in plain, clear and unambiguous language not in anywise conflicting with any other provision of said contract, that the insured, upon request, should furnish proof of the continuance of his total disability and "Upon failure to furnish such proofs, or *if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived.*"

That at the trial of said action in the Circuit Court, as shown by the opinion filed herewith, the evidence disclosed that plaintiff was a farmer operating and managing his mother's farm under contract for one-half of the profits; that the plaintiff received injuries leaving his left ankle stiff; that during the period for which recovery is sought, the plaintiff, because of his ankle,

was unable to do manual labor in the operation of said farm but was able to manage the farm the same as he had formerly done, with the exception that he was unable to do any manual labor incident thereto; that he has received the income and profit from the farm resultant from his management and operation of the farm.

That in said trial the defendant, your petitioner, offered and the court gave an instruction on each count of said petition, said instructions being lettered "L", "M", "N" and "O", which instructed the jury that if they found the plaintiff had been able to substantially perform his duties as owner and operator of a farm, then their verdict must be for the defendant; that upon trial in the Circuit Court, the verdict was for the defendant and judgment was entered accordingly.

That upon appeal to the Kansas City Court of Appeals, the plaintiff appellant assigned error only in the giving of instructions upon the part of the defendant, whereupon your petitioner, required said court to pass upon the submissibility of plaintiff's case and to construe the provisions of the contracts of insurance.

That respondents herein constituting the Kansas City Court of Appeals heard the appeal of plaintiff, Lewis K. Stoner, and rendered judgment reversing the judgment of the Circuit Court of Buchanan County by written opinion, a copy of which is hereto attached and marked "Exhibit A"; that thereafter your petitioner seasonably filed its motion for rehearing, a copy of which is hereto attached and marked "Exhibit B"; that

said motion for rehearing was by the respondents overruled, as shown by a copy of the order overruling said motion attached hereto and marked "Exhibit C".

That the opinion and judgment of respondents in Cause No. 18429 and the record thereof ought to be quashed by this court for the following reasons:

I.

Because the respondents exceeded their lawful jurisdiction in that they failed and refused to follow the last controlling decisions of this court rendered in the cases of *State ex rel. Mutual Benefit Association* v. *Trimble,* 334 Mo. 920; *Prange* v. *International Life Insurance Company,* 329 Mo. 651, and *State ex rel. Commonwealth Casualty Company* v. *Cox,* 322 Mo. 38, wherein this court held that where the language of a policy of insurance is without ambiguity, there is no room for construction, but the unequivocal language is to be given its plain meaning; that Exhibit B hereto attached, in the Cause No. 18429, shows upon its face that the provision of the contract of insurance providing that "if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made," is a plain, unambiguous provision in said policy, which the respondents construed by holding that said provision means that the disability benefits should not be paid only when the insured *is able to engage* and does engage in a business, work, or occupation for profit.

II.

Because the respondents exceeded their lawful jurisdiction in that they failed and refused to follow the last controlling decisions of this court rendered in the cases of *State ex rel. Mutual Benefit Association* v *Trimble,* 334 Mo. 920; *Prange* v. *International Life Insurance Company,* 329 Mo. 651; and *State ex rel. Commonwealth Casualty Company* v. *Cox,* 322 Mo. 38, wherein this court held that where the language of a policy of insurance is without ambiguity, there is no room for construction, but the unequivocal language is to be given its plain meaning; that Exhibit B hereto attached, the opinion in Cause No. 18429, shows that the respondents, in holding Instructions L, M, N and O erroneous by construction, added a contractual liability to that contracted for by the plain, unambiguous language of the contract of insurance, in that respondent held that actual engaging in a recognized occupation, that of farm manager or operator, was not fatal to recovery and further that the insured was entitled to recover if he was unable to earn a livelihood.

III.

Because the opinion on its face shows that respondents failed to recognize and enforce the plain and unambiguous provisions of the policies, relieving the relator of liability if the insured performs any work, follows any occupation or engages in any business for remuneration or profit, which constitutes a violation of respondents' freedom to contract guaranteed by Sec-

tion 1 of the 14th Amendment to the Constitution of the United States, and by Section 30 of Article 2 of the Constitution of Missouri.

Wherefore, in the interest of the uniformity of the law of this State, your petitioner prays this court to issue a writ of certiorari directed to respondents in their official capacities, requiring them and each of them to certify to this court the true, full and complete copies of the opinion, judgment, orders, appellant's abstract of the record, briefs of counsel, and all other acts or proceedings in said cause of *Lewis K. Stoner* v. *New York Life Insurance Company, a corporation,* numbered 18329 on the docket of the Kansas City Court of Appeals, in order that this court may adjudicate upon the legality of such proceedings, and further prays the court to make such other and further adjudications and orders therein as right and justice may require.

CLARK, BOGGS, PETERSON & BECKER,
Attorneys for Petitioner.

State Of Missouri County Of Boone SS

William H. Becker, being duly sworn, upon his oath states that he is agent and attorney for the petitioner herein and as such duly authorized to make this affidavit on its behalf.

Affiant further states that the facts stated in the foregoing petition for certiorari are true and correct to the best of his knowledge, information and belief.

William H. Becker.

Subscribed and sworn to before me this 20th day of February, 1936. My term will expire January 9, 1938.

Mary S. Mitchell,
(Seal) Notary Public.

APPENDIX B.

In The Supreme Court Of Missouri September Term, 1935 State Of Missouri At The Relation Of New York Life Insurance Company, A Corporation, Relator vs. Hopkins B. Shain, Ewing C. Bland and Robert M. Reynolds, Judges Of The Kansas City Court Of Appeals, Respondents No. 34813.

Certiorari.

Now at ths day, on consideration of the petition for a writ of certiorari herein to the said respondents, it is ordered by the court here that the said petition be and the same is hereby denied.

State Of Missouri, SCT.

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Term thereof, 1935, and on the 18th day of March 1936, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 11th day of September 1939.

E. F. Elliott,

(Seal) Clerk.

_____ D. C.

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 26 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. [redacted] 74

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF AND ARGUMENT.

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With him on Brief:
R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

Blank Page

INDEX

Point I 1

Point II 3

Point III 4

Point IV 5

Point V 8

TABLE OF CASES

Fairchild vs. Lohman, 13 F. 2d 252, l. c. 254 6

Hudson vs. Moonier, 304 U. S. 397 3

Lyndon vs. New York Life Ins. Co., 89 F. 2d 78 8

New York Life Ins. Co. vs. Talley, 72 F. 2d 715, l. c. 719 8

Poe vs. Illinois Cent. R. Co., 339 Mo. 1025 7

Ruhlen vs. N. Y. L. Ins. Co., 304 U. S. 202, l. c. 206-7 3

Russell vs. Todd, 60 S. Ct. 527, 84 L. Ed. 517 5

State Farm Mutual Auto Ins. Co. vs. Coghran, 303 U. S. 485 4

State ex rel. Winters vs. Trimble, 315 Mo. 1295, l. c. 1301 6

State ex rel. Security Ins. Co. vs. Trimble, 318 Mo. 173, l. c. 178 6

Stoner vs. New York Life Ins. Co., 90 S. W. 2d 784, l. c. 790-796 3

Stoner vs. New York Life Ins. Co., 114 S. W. 2d 167, l. c. 168 et seq. 3

Blank Page

Supreme Court of the United States

No. 1000.

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY, RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF AND ARGUMENT.

I.

Respondent claims that the testimony in the instant case is entirely different from the record in the Stoner cases wherein it was held that the evidence was sufficient to warrant a finding of total disability, because in the case at bar, in addition to the record in those cases, the deposition of Mr. Stoner (Tr. 75) and the testimony of Dr. H. J. Ryan (Tr. 85) was introduced.

The record shows that *respondent* took Mr. Stoner's deposition shortly before the trial solely for the purpose of ascertaining whether there was any change in his condition since he testified at the trial of the Stoner case at Gallatin (Tr. 25). That deposition was introduced by petitioner (Tr. 25). A comparison of the testimony in

Mr. Stoner's deposition with his testimony contained in the record in the Stoner cases shows that it is the *same* (Tr. 26-54, 78-82). It is simply a repetition of his testimony previously given, with the additional statement his physical condition had not changed.

The testimony of Dr. Ryan (Tr. 85) shows exactly the same disability as the testimony of Dr. Gray (Tr. 57), Dr. Thompson (Tr. 66) and Dr. Settles (Tr. 70) contained in the record of the Stoner cases. The respondent has not pointed out wherein there is any difference whatever in the facts shown in the record in this case (including the deposition of Mr. Stoner and the testimony of Dr. Ryan) and the evidence in the records in the Stoner cases. There is none. So the evidence in the instant case is the same as that which the Kansas City Court of Appeals in the Stoner cases held was sufficient to sustain a finding of total disability. In the majority opinion of the court below there is no pretense the facts shown in the case at bar differ from those stated in the opinion of the Kansas City Court of Appeals in the Stoner cases and the decision is not put on that ground, but squarely on the ground that the court *was not bound by the decision of the state court of appeals that, within the meaning of the policy, the petitioner was totally disabled if he was unable to perform in the usual and customary manner substantially all the material acts of his occupation, and that the evidence was sufficient to sustain a finding of total disability.*

If we are right in saying that the decision of the Kansas City Court of Appeals is the law of the state, then it is apparent that the majority opinion below is not based

on the law of the state but upon the "general" law, and where that appears the judgment should be reversed (*Ruhlen* v. *N. Y. L. Ins. Co.*, 304 U. S. 202, l. c. 206-7; *Hudson* v. *Moonier*, 304 U. S. 397).

II.

It is claimed (a) that the decisions in the Stoner cases do not forbid "the direction of a verdict for plaintiff" (respondent); (b) that the holding of the Kansas City Court of Appeals that petitioner had a submissible case did not require the trial court to find for him; and (c) the trial court expressly found the facts in favor of respondent.

The state court of appeals did expressly rule that the facts did not show, as a matter of law, that petitioner was not totally disabled within the meaning of the policy and therefore a directed verdict for respondent was forbidden (*Stoner* v. *New York Life Ins. Co.*, 90 S. W. 2d 784, l. c. 790-796; *Stoner* v. *New York Life Ins. Co.*, 114 S. W. 2d 167, l. c. 168 *et seq.*).

That court did hold that Mr. Stoner was not, as a matter of law, entitled to recover because he was unable to perform some particular duties of his occupation (*Stoner* v. *New York Life Ins. Co.*, 114 S. W. 2d 167). We do not claim the decision *required* the jury (or the court) to find for petitioner. What that court did hold in both cases was and what we do claim is that, upon the facts, it is a question for the jury (or a court sitting as a jury) to say whether plaintiff was totally disabled under the rule of law announced by the court, upon a consideration of all the evidence relating to his occupation as a

whole. Our contention is that the trial court did find that he was totally disabled; that there was substantial evidence to support that finding and the court below had the right only to inquire whether there was substantial evidence to support that finding; and it did not have the right to sit as another jury and make a finding of its own (*State Farm Mutual Auto Ins. Co.* v. *Coghran*, 303 U. S. 485).

III.

The district court did not find the fact of total disability in favor of respondent. The court filed a memorandum opinion. It is no part of the record. In that opinion the court did describe the physical condition of the petitioner as he found it from observing the petitioner and the evidence. There is not and never has been any controversy about it. Respondent, after admitting it (Tr. 75), proved it. It is conceded that the only physical injury Mr. Stoner suffered was to his left leg and ankle that became ankylosed. No other part of his body was injured (Tr. 65). Now the ultimate fact required to be found was *to what extent that physical condition disabled petitioner.* Upon that issue the trial court made this one finding:

"We make this—

Finding of Fact.

From May 29, 1936, until January 7, 1938, the defendant was totally and presumably permanently disabled by reason of the injury described by him June 29, 1931. Exceptions allowed" (Tr. 102).

A finding as to what is one's physical condition is one thing; a finding as to what extent that physical condition affected ability to work is quite another. The memorandum opinion (though not a part of the record) discloses that the district court believed that the evidence did not show that petitioner was able to engage in any business (Tr. 101). The trier of the fact found that petitioner's disability was total, In the court below respondent did not claim that the district court had not so found. Its contention was that there was no evidence to support that finding.

IV.

It is contended that *Russell* v. *Todd*, 60 S. Ct. 527, 84 L. Ed. 517, decides that the federal courts are bound only by the decision of the highest courts of the state, and therefore the decisions of the courts of appeals of Missouri do not declare the law binding upon the federal courts, but are only persuasive.

In that case there was no definite ruling by the New York Court of Appeals on the law involved. This court followed the ruling of the appellate division of the Supreme Court of New York and used this language:

> "In the absence of a definite ruling by the highest court of the state, we accept the decision of the appellate division and the reasoning of the court of appeals on which it rests as persuasive that the three-year statute does not apply," etc.

Respondent overlooks the fact that the appellate division of the Supreme Court of New York is not a court of last resort, but is an intermediate court from whose

decisions an appeal lies to the court of appeals. In Missouri no appeal lies from a decision of any of its courts of appeals. Under its constitution and the decisions of its Supreme Court, with respect to controversies over which the Kansas City Court of Appeals (or the Springfield or St. Louis Court of Appeals) has jurisdiction, it is the court of last resort (*State ex rel. Winters* v. *Trimble*, 315 Mo. 1295, l. c. 1301); and right or wrong, its decisions are binding on the Supreme Court on certiorari, if there be no prior conflicting decision of that court (*State ex rel. Security Ins. Co.* v. *Trimble*, 318 Mo. 173, l. c. 178; *Fairchild* v. *Lohman*, 13 F. 2d 252, l. c. 254).

A court of last resort, within its jurisdiction, is the highest court of the state. This court has held that the court of a justice of the peace is the highest court of the state, where there is no appeal from his decision to a higher state court, to which a writ of error lies from this court. And because a Missouri court of appeals, within its jurisdiction, is the highest court of the state, writs of error issue from this court to it.

The law is succinctly stated thus:

> "The decision of an intermediate appellate court is the law of the state or jurisdiction until such decision is reversed or overruled by the court of last resort, and the duty of a lower court to follow such decision is not affected by the fact that it is contrary to the decisions of the court of last resort of a sister state on the same question. But a decision of an appellate court, not of last resort, which is not in accord with the decisions of the court of last resort, is not authoritative.
>
> "Where there are several appellate courts or divisions with co-ordinate jurisdiction, an inferior court

in one division or district should follow the decisions of the appellate court of another division or district as to a matter which has not been passed upon by its own appellate court; but in case there is a conflict between the decisions of such courts or divisions, an inferior court should follow the decisions of its own appellate court" (15 C. J., page 922, Sec. 309, cases cited under note).

It certainly is true, as the Supreme Court of Missouri said in *Poe* v. *Illinois Cent. R. Co.*, 339 Mo. 1025, cited by respondent, that where the Supreme Court *has* spoken, its decision is binding on all the courts of the state. But it is equally true that where the Supreme Court has *not* spoken, the decisions of the state courts of appeals declare the law of the state. It is inconceivable that respondent is correct in saying: "Until the Supreme Court has spoken, there is no law of the state" (Respondent's Brief page 12).

If so, there is no law of the state on thousands of questions settled by repeated decisions of its courts of appeals in cases within their jurisdiction and on which there is no utterance of the Supreme Court. If so, there is no law of this state as to what is meant by "total disability" within the meaning of an insurance policy (assuming the Supreme Court has not decided the question), though all of the courts of appeal have with unanimity decided the question in a multitude of cases extending over a period of nearly a half a century, and those decisions (until the Supreme Court declares to the contrary) are binding on every *nisi prius* court in the state and every litigant who applies to them for judgment. Poor old Missouri.

V.

(a) The $790.70 premiums paid may not be considered in determining the amount in controversy. Petitioner can not recover the premiums paid. He paid them voluntarily knowing his exact condition and the extent of his disability. It was not a payment under a mistake of fact. The case relied upon by respondent, *Lyndon* v. *New York Life Ins. Co.*, 89 F. 2d 78, is not in point. In that case the insured paid the premiums under a mistake of fact; he "had no knowledge he was in a serious condition, had not been so advised, and expected shortly to return to his normal duties"; and the payments were made because he thought he was not totally disabled, and therefore was required to make them. In the case at bar petitioner paid the premiums voluntarily at a time when he knew his exact condition, when he claimed to be totally disabled and when he knew that if he was totally disabled he was under no obligation to pay. Under such circumstances he could not recover the payments if he would (cases cited in *New York Life Ins. Co.* v. *Talley*, 72 F. 2d 715, l. c. 719).

(b) This is an action seeking a declaratory judgment. In order to confer jurisdiction there must be an actual existing controversy; and where the defendant's answer denies there is any existing controversy the plaintiff must prove one does exist. The petition alleged this existing controversy: That the defendant "*is insisting* that there is *now* due him" $2,375 disability payments "and that he is entitled to have the premiums falling due on said policies during said period in the amount of $790.70 waived, and

said amount so paid for premiums refunded to him, making a total of $3,165.70 for which defendant *is making demand* of payment upon plaintiff, and which plaintiff denies that defendant is entitled to under the provisions of said policies of insurance" (Tr. 8). The answer denied "that he is claiming or ever claimed to the plaintiff that he was entitled to have the premiums falling due on said policies in the sum of $790.70 waived. This defendant admits that he has paid said premiums during said period, but denies that he has ever claimed to the plaintiff that he is entitled to a refund of said premiums so paid or any part thereof; and denies that he ever demanded the repayment of said sum or any part thereof; and denies he is demanding the same now; and denies that any controversy exists or ever existed between the plaintiff and defendant with respect to the right of the defendant to have said sum of $790.70 or any part thereof so paid on account of said premiums refunded to him" (Tr. 15).

The controversy on which the plaintiff relied was an existing controversy based upon the demand which it was alleged the defendant was making for a return of the premium paid. It was incumbent upon the plaintiff to prove that controversy. It is now suggested that while the defendant has never demanded repayment, has never claimed and is not claiming now that he is entitled to any refund, yet he *might* hereafter claim a return of the premiums if he is successful in establishing total disability. The fact that he *might* in the future claim something he has never claimed does not create an existing controversy, and if it did, no such possible controversy was pleaded or proved.

Petitioner renews his prayer for a writ of certiorari and a reversal of the judgment below.

Respectfully submitted,

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With him on Brief:
R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

Blank Page

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 9 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 74.

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

PETITIONER'S ANSWER TO RESPONDENT'S BRIEF ON FINAL HEARING.

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With him on Brief:

R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

Blank Page

INDEX

I. Is the Decision of the Circuit Court of Appeals in Conflict with the Decision of the Kansas City Court of Appeals in Stoner vs. New York Life Insurance Co., 90 S. W. 2d 784, and Stoner vs. New York Life Insurance Co., 232 Mo. App. 1048, 114 S. W. 2d 167 1

II. The Opinion of the Kansas City Court of Appeals in the Stoner Case Does Not Conflict with the Opinion of the Springfield Court of Appeals in Jones vs. Metropolitan Life Insurance Company, 130 S. W. 2d 967, or the Opinion of the St. Louis Court of Appeals in Smith vs. Metropolitan Life Insurance Company, 108 S. W. 995, or Eden vs. Metropolitan Insurance Company, 138 S. W. 2d 745 13

III. The Kansas City Court of Appeals Is a Court of Last Resort in Missouri 14

Table of Cases

Allen vs. Larabee Flour Mills Corp., 328 Mo. 226 1-2

Barr vs. Mo. Pac. R. R. Co., (Mo. Sup.) 37 S. W. 2d 927 2

Bello vs. Stuever, (Mo. Sup.) 44 S. W. 2d 619 2

Chappee vs. Lubrite Refining Co., (Mo. Sup.) 85 S. W. 2d 1034 2

Eden vs. Metropolitan Insurance Company, 138 S. W. 2d 745 13

Jones vs. Metropolitan Life Insurance Company, 130 S. W. 2d 967 13

Poe vs. Illinois Cent. R. Co., 339 Mo. 1025 15

Shelton vs. Wolf Cheese Co., (Mo. Sup.) 93 S. W. 2d 947 2

Smith vs. Metropolitan Life Insurance Company, 108 S. W. 2d 995 13
State Farm Mutual Auto Ins. Co. vs. Coghran, 303 U. S. 485, 82 L. Ed. 970 3
Stoner vs. New York Life Insurance Co., 232 Mo. App. 1048, 114 S. W. 2d 167 1
Stoner vs. New York Life Insurance Co., 90 S. W. 2d 784 ..... 1, 5-8, 11
Trainer vs. Spahlerite Mining Co., 243 Mo. 359 2

TEXTBOOK

15 Corpus Juris, page 922, Section 309 15

Supreme Court of the United States

No. 74.

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY, RESPONDENT.

PETITIONER'S ANSWER TO RESPONDENT'S BRIEF ON FINAL HEARING.

I.

Is the Decision of the Circuit Court of Appeals in Conflict with the Decision of the Kansas City Court of Appeals in Stoner v. New York Life Insurance Co., 90 S. W. 2d 784, and Stoner v. New York Life Insurance Co., 232 Mo. App. 1048, 114 S. W. 2d 167?

Petitioner asserts that it is, and respondent asserts it is not. Let us see.

(a) In both cases decided by the Kansas City Court of Appeals the Insurance Company insisted that the plaintiff had not introduced substantial evidence to sustain a finding by a jury (or a court sitting as a jury) that he was totally disabled; that therefore defendant was entitled to a directed verdict on its demurrer to the evidence, and consequently any error in the instructions was harmless (See 90 S. W. 2d l. c. 790; 114 S. W. 2d l. c. 168). Since errors in instructions are harmless if the defendant is entitled to a directed verdict (*Allen* v. *Larabee Flour Mills*

Corp., 328 Mo. 226; *Shelton* v. *Wolf Cheese Co.*, (Mo. Sup.) 93 S. W. 2d 947; *Barr* v. *Mo. Pac. R. R. Co.*, (Mo. Sup.) 37 S. W. 2d 927; *Bello* v. *Stuever*, (Mo. Sup.) 44 S. W. 2d 619; *Chappee* v. *Lubrite Refining Co.*, (Mo. Sup.) 85 S. W. 2d 1034; *Trainer* v. *Spahlerite Mining Co.*, 243 Mo. 359), it was necessary for the Kansas City Court of Appeals to and it did determine whether the evidence submitted by the plaintiff, if true, was sufficient to sustain a finding by the trier of the facts that plaintiff was totally disabled within the meaning of the policies, under the rule of law stated by the court (and in many other Missouri cases) as to what constitutes "total disability."

In both cases the Kansas City Court of Appeals held, as a matter of law, that the evidence was sufficient to sustain a finding that the plaintiff was totally disabled. Of course the Appellate Court did not hold that the trier of the fact had to *believe* the evidence introduced by the plaintiff and the verdict *had* to be for him.

(b) In the case at bar the parties waived a jury (Record reprint page 19) and the case was tried by the court sitting as a jury. This is an action for a declaratory judgment. Respondent alleged that there was this existing controversy between the parties: Respondent was contending it was not liable to petitioner for disability benefits from May 29, 1936, to January 7, 1938, because he was not totally disabled during that period. Petitioner was contending he was totally disabled. The sole controversy the court was asked to determine by its finding and judgment was this: Was Lewis K. Stoner totally disabled from May 29, 1936, to January 7, 1938? If the case had been submitted to a jury the only verdict required of it would have been that Mr. Stoner was or was not totally disabled during that period. That was the ultimate fact to be determined. When a jury was waived that was the ultimate finding required of the court. The court did find that ultimate fact, as follows:

> "From May 29, 1936, until January 7, 1938, the defendant (petitioner) was totally and presumably permanently disabled by reason of the injury received by him June 29, 1931" (Record reprint p. 100).

The decision of the Circuit Court of Appeals is contrary to both of the decisions of the Kansas City Court of Appeals. On the identical evidence, the latter court held that the testimony was sufficient to sustain a finding that the plaintiff was totally disabled while the former court held that the testimony *conclusively* established that he was not totally disabled. The Circuit Court of Appeals did not rule that the Kansas City Court of Appeals had not held that the evidence was sufficient to sustain the finding, but put its decision upon the ground that:

> "We are not bound to follow the decisions and reasonings of the intermediate appellate courts of Missouri" (Record reprint p. 112),

and the court were

> "constrained to find that the evidence conclusively establishes that the insured not only can but does substantially perform all the substantial and material acts necessary to the prosecution of the business in which the insured is engaged and that such business returns a profit" (Record reprint p. 113).

The Circuit Court of Appeals made its own finding of facts as if it were the trier of the facts. That was not its province. It had the right only to determine whether, under the law of Missouri, there was substantial evidence to support the finding of fact made by the District Court. If so, that finding was conclusive (*State Farm Mutual Auto Ins. Co.* v. *Coghran*, 303 U. S. 485, 82 L. Ed. 970).

(c) In making its finding that petitioner was "engaged in a business for profit" and therefore he was not totally disabled, the Circuit Court of Appeals again refused to follow the decision of the Kansas City Court of Appeals in this respect:

In the case at bar the evidence introduced by respondent showed that the applications for the policies stated that petitioner's occupation was a farmer operating and managing a farm. He owned one farm and rented an adjacent farm and operated both. He had only a grammar school education obtained in a country school and he was not qualified by education or experience to engage in any other occupation or profession; in fact he knew nothing of any business other than farming (Record reprint pp. 24-25). He operated the farm with his own labor and one, and sometimes two, farm hands who assisted in the work. Prior to his injury he plowed and cultivated the ground, planted crops and cultivated, harvested and fed or hauled them to market. He himself selected, bought, fed, attended to, hauled and sold livestock. He made repairs, did the chores and performed the physical work required to operate the farm. He directed his hired men what to do and personally supervised their work. As a result of his injury he could not do *any physical* work. Mentally he was not affected. He could and did continue to direct his hired men what to do, although he could not personally supervise their work. After he was injured, pursuant to his instructions, the hired men did all the physical work. The petitioner employed commission men to buy stock which they, not he, selected and which the hired men fed and which were hauled to market by them and sold by commission men when petitioner directed.

Because he *directed* what was done on the farm the Circuit Court of Appeals held that though he could not perform the physical work of a farmer, he was carrying on a business and therefore he was not totally disabled. In other words, the court below held that directing the operation of a farm was a business in itself, separate and distinct from petitioner's business as a farmer, and not merely a part of the duties of one occupation, that of a farmer managing and operating his own farm. In so doing the court below upheld the contention of respondent

which the Kansas City Court of Appeals expressly denied. We repeat, the case at bar was tried on the identical facts shown in the two Stoner cases decided by the Kansas City Court of Appeals. In fact, the respondent (by agreement) simply introduced the record in one of those cases (Record reprint pp. 19, 24). In the first Stoner case (90 S. W. 2d 784) the theory of the insurance company was that though Mr. Stoner could not perform the physical work he was required to do as a farmer, he was carrying on a business because he could and did direct the operation of the farm. On that theory the insurance company asked and the trial court gave an instruction to the jury which treated the management and operation of the farms by direction of Mr. Stoner as a business separate and distinct from his business as a farmer, and told the jury that if he could perform his managerial duties he was not totally disabled. The Kansas City Court of Appeals held the instruction was erroneous because in doing the physical work and directing the operations on the farm, the petitioner was engaged in but *one* occupation, that of a farmer managing and operating his farm, and the instruction singled out certain duties of that one occupation and told the jury that if the petitioner was able to perform those duties he was not totally disabled. For the convenience of the court, we quote at length from the decision. The court said:

> "It is contended first by plaintiff that error was committed by the trial court in giving instructions L, M, N, and O in behalf of defendant on the trial. He complains that each singles out from among the duties of plaintiff's occupation as a farmer in the actual cultivation of his farms one of the duties of such occupation; that each advised the jury that, as a matter of law, plaintiff was not totally disabled and could not recover if, since his injury, he could perform substantially his duties as the owner and operator of such farms or as a manager of such, without regard to whether he could do the work and labor required of him as a farmer in his actual farming operations;

that such instructions ignored the plaintiff's real occupation as that of farmer or that of farming, and treated his occupation as that of a farm owner and farm operator or farm owner and farm manager separately and apart from his occupation as a farmer performing actual farm work and labor and advised the jury that, if he could perform the duties of such owner and operator or of such owner and manager he could perform the duties of his occupation under the policies; that, in so doing, such instructions were misleading and erroneous; and that such instructions should have submitted plaintiff's ability or inability to perform substantially his duties in his occupation as a farmer." * * *

"It is clear from the answers in each of the applications for the policies sued on that plaintiff gave his occupation as that of a farmer, farming, operating, and managing farms of which he was the owner, and that, as such, he was insured by the defendant under the policies sued on.

"The plaintiff was living upon, operating, and managing his own farms—that is, farms owned or rented by him of which he was the proprietor—and was doing the actual farm work and farm labor required in the actual farming of them. In so doing, he came within the definition of a farmer as declared by this court in the case of *Foglesong* v. *Modern Brotherhood of America, supra,* where, in speaking of the plaintiff in that case, it was said, 'He was a farmer in the sense the term is usually understood to express; that is, one who directs the business of a farm, and works at farm labor.' The instant case, in many of its aspects, is very similar to the Foglesong Case.

"Plaintiff's entire duties were not limited to those of owner and operator or those as owner and manager, but extended to and embraced his duties as a farmer engaged in the actual farming operations on said farms and the farming business conducted thereon, which included farm work and labor.

"To say of one that he 'owns and operates and manages a farm,' however, does not necessarily imply that he does the work and labor thereon in the actual farming thereof. Such labor may be done by

himself or through others. *Where he both directs the operations on said farm and does farm labor thereon, both activities are embraced within his occupation as a 'farmer.'*

"The instructions were therefore, under the facts in the record, erroneous. They not only commented on the evidence, but they were calculated to mislead the jury as to the real issues involved, which concerned plaintiff's ability or inability as a farmer substantially to perform the duties of his occupation as a farmer during the time for which the benefits herein are claimed by him. They should have submitted his ability substantially to perform the duties of his occupation as a farmer and not merely his ability to perform his duties as the operator and manager of his farms. It is shown by the evidence that, at the time of his injuries, he was doing such necessary farm labor as was required in the operation and management of his farms and in conducting the business of farming thereon and was actually participating in the doing of such labor at such time; and it is for alleged inability to perform such acts substantiallly in the prosecution of his occupation after his injury, whereby he was rendered unable substantially to perform such, that the benefits herein are sought.

"Under the particular facts appearing in the record, such instructions were further erroneous in directing the jury that, if the plaintiff was able to perform his duties as the operator and the manager of his farms, then he was not totally disabled. They should have required the jury to find that he was able substantially to perform the duties of his occupation as a farmer in the normal, natural, and customary way and in such a way as to earn a livelihood. There is evidence in the record which may not be ignored which tends to show that, while plaintiff did in a way or after a fashion do some of the acts required of him as the operator and manager of his farms in directing the activities thereon through others, yet he did so at great inconvenience and pain and distress to himself by reason of his injury and his physical condition consequent thereon. There is no evidence that he did any of the acts of manual labor required in the actual farming operations on said farms." * * *

"Plaintiff complains of defendant's instruction J. There is no evidence in the record tending to show that the plaintiff had engaged in the business, work, or occupation of operator or manager of a farm for profit other than in connection with the farm or farms which he was engaged in operating and farming as owner at the time the policies in suit were issued to him. His operation and management of such farms were as the owner thereof and were connected with his farming operations as a farmer thereon. At the time that the policies in suit were issued to him and at the time he was injured, he was engaged in directing the business of such farms and in doing the actual farm labor thereon in the operation thereof; and, he being so engaged, his occupation was that of a farmer. *Foglesong* v. *Modern Brotherhood of America, supra.* The policies in suit insured him against total disability from the performance of his duties in such occupation (that is, in his occupation as farmer) *and not from disability merely to perform the duties of an operator and manager of farms as a distinct and separate occupation.* There is no evidence that he did so engage. Under the facts in the record, to hold that he was engaged in the business of managing and operating farms for profit or to forbid him a recovery herein for the reason that he was unable as a result of his injuries to perform the necessary acts of farm labor required of him in the operation of his farms, although he continued in a way to operate and manage said farms and to direct the business thereon through hired agencies and help, would be to defeat the very object and purpose of the contract of insurance, which was to provide the payment of benefits to him during his disability to compensate him for his loss of time and effort, and would be to render such contract a nullity. This will not be done. *Wall* v. *Continental Casualty Company, supra; Foglesong* v. *Modern Brotherhood of America, supra.* The occupation in which plaintiff was insured is the occupation which plaintiff was following at the time that the policies were issued and at the time that he was injured and became disabled" (*Stoner* v. *N. Y. Life Ins. Co.*, 90 S. W. 784, l. c. 794 *et seq.*) (Italics supplied).

The Circuit Court of Appeals simply ignored the decision of the Kansas City Court of Appeals that the petitioner, in doing the physical work and directing the operation of the farm he owned and the farm he rented, was engaged in *one* occupation or business, that of a farmer operating and managing his own farm. The court below had no right to do that if the decision of the Kansas City Court of Appeals is binding. Its ruling is not only in conflict with the decisions of the Kansas City Court of Appeals in the Stoner cases but also with the numerous cases cited in our original brief.

If, as a result of his injury, Mr. Stoner had lost one foot and one hand, he could have done everything that he did do which the court below held constituted carrying on business; and, if the ruling below is right, he would not be entitled to recover disability benefits because he would not be totally disabled. But the policy expressly provides that the loss "of one foot and one hand shall constitute total disability for life" (Record reprint p. 22). The parties never contemplated, and the law of Missouri does not contemplate, that to be totally disabled, an insured, whose occupation is that of a farmer operating and managing his own farm, must be both mentally and physically disabled to such an extent that he is absolutely helpless. If he cannot perform substantially the duties of his occupation in the customary and usual manner in which he performed them before he was injured, under all the Missouri cases he is totally disabled.

(d) The court below, and the respondent in its brief here quote the observations of the District Court in his memorandum opinion regarding the physical condition of the petitioner, and treat it (or at least respondent's counsel treat it) as the *finding of fact* made by the trial court. A statement as to what is one's physical condition is one thing; a finding as to what extent that physical condition affects ability to work is quite another. The memorandum opinion (which is not a part of the record) discloses that the District Court believed the evidence did

not show the petitioner was able to engage in any business. It pictured petitioner's physical condition as the court saw it. The finding of the trial court as to the extent of petitioner's disability as the result of his physical condition is found in the separate *finding of fact* made by the trial court to which we have called attention. The trier of the fact found that the petitioner's disability was total. In the court below respondent did not claim that the District Court had not so found. Its contention was that there was no evidence to support that finding.

(e) Respondent calls attention to the fact that in addition to the provision defining total and permanent disability which entitled the appellee to disability benefits and a waiver of premium, all of the policies in question contained this further provision:

> "Before making any income payment or waiving any premium the company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, or if the insured performs any work or follows any occupation or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived" (Respondent's brief pp. 20-21).

Respondent contends:

> "In this case we submit that the language is clear to the effect that if the insured actually did any work, engaged in any business or occupation for profit, that he is not entitled to further income payments. His testimony is equally clear that during the time in question he did actually engage in an occupation or business for profit. It is submitted that Petitioner has brought himself within the above quoted provision of this contract and relieved the Respondent of the duty to make any further payments" (Respondent's Brief p. 22).

But the respondent admits that this question was raised and passed upon by the Kansas City Court of Ap-

peals in *Stoner* v. *New York Life Ins. Co.*, 90 S. W. 2d 794, where the court held:

> "In other words, the insuring clause gives the right to benefits when insured is disabled so as to prevent the doing of certain things. The last clause but negatives his right to benefits when he is not so prevented, but when he is able so to engage and does so engage, they are correlative clauses. Both are to be given the same construction."

It would be strange indeed if identical words used in two clauses of an insurance policy, one almost immediately following the other, meant one thing in one clause and another thing in the other clause. The two provisions are correlative as the Kansas City Court of Appeals held, and that construction of the contract is binding.

Respondent says:

> "It is true that an application for certiorari was denied in this case by the Supreme Court. However, denial of the application does not denote affirmance of the opinion. The application was made in order to preserve the objections to this ruling so that it might not become the law of the case. Certiorari, except in exceptional cases, will not lie to the Supreme Court of Missouri until final judgment is entered. Since there was no final judgment, and since no identical case had been passed upon by the Supreme Court, there was ample ground for the denial of the writ without an affirmance of the opinion" (Respondent's Brief p. 23).

As we pointed out in our original brief, respondent applied to the Supreme Court of Missouri for a writ of certiorari to quash the opinion of the Kansas City Court of Appeals on the ground that the provisions of the policy were clear and unambiguous, and in construing those provisions the opinion of the Court of Appeals was in conflict with prior decisions of the Supreme Court holding that a contract which was unambiguous was not open to construction. The Supreme Court denied the writ.

Following its custom in such cases, the Supreme Court filed no opinion. Of course in denying the writ, the Supreme Court did not rule that the opinion of the Kansas City Court of Appeals on the *merits* was right or wrong. The latter court is a court of last resort. Right or wrong, its opinions are binding upon the Supreme Court. To permit that court to determine whether the opinion of the Appellate Court was right or wrong on the merits would be, in effect, to permit an appeal from the Appellate Court when under the laws of Missouri an appeal is not allowed. The Supreme Court, on certiorari, may say only that the opinion of the Court of Appeals (right or wrong) does or does not conflict with a prior controlling decision of that court. About such a controlling opinion, right or wrong, the opinion of the Court of Appeals is final. When we say that the refusal of the Supreme Court to grant certiorari was a ruling by that court that the decision of the Kansas City Court of Appeals was "right," we mean to say that, by refusing the writ, the Supreme Court held the ruling of the Kansas City Court of Appeals *that the policies were ambiguous and open to construction* was right; for if the policies are unambiguous the ruling of the Appellate Court would have conflicted with prior decisions of the Supreme Court holding unambiguous contracts are not open to construction, and the writ would have been granted. For that reason we say that the Supreme Court of Missouri, by denying certiorari, held that the policies are ambiguous and open to construction, which is directly contrary to the opinion of the Circuit Court of Appeals and the contention of respondent.

It is naively suggested by respondent's counsel that the Supreme Court may have refused certiorari because the judgment of the Kansas City Court of Appeals was not a final judgment, since it reversed and remanded the case for another trial (Respondent's Brief pp. 37-38). The decision and opinion of the Court of Appeals is final, no matter whether the cause is affirmed or reversed and remanded. It would be strange indeed, if the Supreme

Court, on certiorari, could quash an opinion of the appellate court which conflicted with its own, only when the appellate court rendered an opinion affirming a judgment of a trial court.

II.

The Opinion of the Kansas City Court of Appeals in the Stoner Case Does Not Conflict with the Opinion of the Springfield Court of Appeals in Jones v. Metropolitan Life Insurance Company, 130 S. W. 2d 967, or the Opinion of the St. Louis Court of Appeals in Smith v. Metropolitan Life Insurance Company, 108 S. W. 2d 995, or Eden v. Metropolitan Insurance Company, 138 S. W. 2d 745.

A mere glance at these cases discloses that the evidence on the part of the plaintiff in each case showed that he continued to perform all of the duties of his occupation just as he had always done during the term of his employment. In the Smith case, after laying down the same rule of law stated in the Stoner cases, the court held that a demurrer to the evidence should have been sustained because:

> "Ignoring defendant's evidence and taking into consideration only the evidence adduced on behalf of plaintiff as well as plaintiff's own testimony, it clearly appears that plaintiff worked at his usual employment in the usual and customary way, not only prior to March 31, 1932, but also during April, May and the early part of June, 1932, after the policy sued on was canceled. It appears without dispute that he was not only able to do this but that he worked over time both before and after the date of the cancellation of the policy sued on" (108 S. W. 2d l. c. 998).

In the Jones case the plaintiff was precluded from recovering for the same reason. In the Eden case the court laid down the same rule of law announced in the Stoner cases as to what constitutes total disability but denied a recovery because:

"Not only did plaintiff's own evidence show that during his employment by the Lead Company he was physically able to perform in the usual and customary way all the material acts of the job assigned to him, but that, indeed he was so proficient at his work, and was so able to do more than the minimum work called for by the basic rate of pay, that he regularly earned substantial bonuses for himself, and likewise made it possible for regular bonuses to be earned by those of his fellow employes who hauled away the cars he filled."

III.

The Kansas City Court of Appeals Is a Court of Last Resort in Missouri.

It is true that appeals from Circuit Courts in certain counties of the state run to that court. Appeals from certain other counties run to the St. Louis Court of Appeals and from certain other counties to the Springfield Court of Appeals. The county in which the Circuit Court sits determines to which court an appeal shall go. But when any case reaches any Court of Appeals, its decision is statewide in its application. It is true that the Supreme Court has control over the courts of appeal in that it may mandamus an appellate court to assume jurisdiction or prohibit it from exceeding its jurisdiction, and it may quash the opinion of any court of appeal on certiorari if it conflicts with any prior controlling decision of the Supreme Court. If there be no conflict, the decision of any court of appeal in any case within its jurisdiction is final. It is a court of last resort. The cases cited in our original brief decided by the Supreme Court of Missouri so hold.

There are two divisions of the Supreme Court of Missouri. Each is a court of last resort. It infrequently happens that the decision of one division is in conflict with that of the other. In such instances the practice is, after opinion in division, to send the case to the court *en banc* composed of both divisions, and that court settles

the conflict. But because that may be done, or because this court in a proper case may overrule a decision of either division of the Supreme Court is no reason for saying that court is not a court of last resort.

What is the law of the state? The answer, as stated in 15 Corpus Juris, page 922, Section 309, is this:

> "The decision of an intermediate appellate court is the law of the state or jurisdiction until such decision is reversed or overruled by the court of last resort, and the duty of a lower court to follow such decision is not affected by the fact that it is contrary to the decisions of the court of last resort of a sister state on the same question. But a decision of an appellate court, not of last resort, which is not in accord with the decisions of the court of last resort, is not authoritative.
>
> "Where there are several appellate courts or divisions with co-ordinate jurisdiction, an inferior court in one division or district should follow the decisions of the appellate court of another division or district as to a matter which has not been passed upon by its own appellate court; but in case there is a conflict between the decisions of such courts or divisions, an inferior court should follow the decisions of its own appellate court."

It certainly is true, as the Supreme Court of Missouri said in *Poe* v. *Illinois Cent. R. Co.*, 339 Mo. 1025, cited by respondent, that where the Supreme Court *has* spoken, its decision is binding on all the courts of the state. But it is equally true that where the Supreme Court has *not* spoken, the decisions of the state courts of appeals declare the law of the state. It is inconceivable that respondent is correct in saying: "Until the Supreme Court has spoken, there is no law of the state."

If so, there is no law of the state of Missouri on thousands of questions settled by repeated decisions of its courts of appeals in cases within their jurisdiction and on which there is no utterance of the Supreme Court. If so, there is no law of this state as to what is meant

by "total disability" within the meaning of an insurance policy (assuming the Supreme Court has not decided the question), though all of the courts of appeal have with unanimity decided the question in a multitude of cases extending over a period of nearly a half a century, and those decisions (until the Supreme Court declares to the contrary) are binding on every *nisi prius* court in the state and every litigant who applies to them for judgment.

Since it is obvious that the decision of the Circuit Court of Appeals was based on the erroneous notion that that court was not bound by the decisions in the Stoner cases or any of the numerous other cases decided by the Courts of Appeal of Missouri, its judgment should be reversed, even if it were true, as that court *erroneously* said, that the Supreme Court of Missouri has not declared the law in the cases decided by it cited in our original brief.

Respectfully submitted,

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With him on Brief:

R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

Blank Page

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 24 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

LEWIS K. STONER,
Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

No. [redacted] '74

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BOYLE G. CLARK,
PAUL M. PETERSON,
WILLIAM H. BECKER,
Columbia, Missouri,
Counsel for Respondent.

LOUIS H. COOKE,
New York City,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

Blank Page

INDEX.

Page

I. The petition for certiorari should be denied, because petitioner has failed to comply with Rule 38 of this Court in that he has not stated the statutory provision believed to sustain the jurisdiction of the Court 1

II. The Circuit Court of Appeals in deciding this case followed and properly applied the law of Missouri 2

III. There is no ruling by the Supreme Court of Missouri that the policies in question are not plain and unambiguous, and, therefore, subject to judicial construction 7

IV. The opinion below is not in conflict with "the law of Missouri" and is not in conflict with the case of Erie Railroad Co. v. Tompkins 10

V. There is no important question of local law or of the common law involved in the decision of this case 13

VI. The amount involved is more than three thousand dollars ($3,000.00) and the federal courts have jurisdiction 14

Conclusion 15

Cases Cited.

Bellows v. Travelers Ins. Co. (Mo.), 203 S. W. 978.... 7

Erie Railroad Co. v. Hilt, 247 U. S. 97.....11, 12, 13

Heald v. Aetna Life Insurance Company, 340 Mo. 1143, 104 S. W. (2d) 379.....5, 6, 7, 9, 10

Lydon v. New York Life Ins. Co., 89 Fed. (2d) 78.... 14

Massachusetts Protective Ass'n v. Mauber, 110 Fed. (2d) 203 7

Poe v. Illinois Central R. Co., 339 Mo. 1025, 99 S. W. (2d) 82 11
Russell v. Todd, ... U. S. ...., 60 S. Ct. 527, 84 L. ed. 517, l. c. 523 (1940) 12, 13
State ex rel. Duraflor Products Co. v. Pearcy, 325 Mo. 335, 29 S. W. (2d) 83 8
State ex rel. Metropolitan Life Ins. Co. v. Allen, 337 Mo. 525, 85 S. W. (2d) 469 7
State ex rel. Metropolitan Life Ins. Co. v. Hostetter, 338 Mo. 589, 92 S. W. (2d) 122 7
State ex rel. New York Life Ins. Co. v. Shain 7
Stoner v. New York Life Insurance Company, 90 S. W. (2d) 784 ..... 3, 7, 8, 10
Stoner v. New York Life Insurance Company, 114 S. W. (2d) 167 ..... 3, 5, 6, 7
Trapp v. Metropolitan Life Ins. Co. (U. S. C. C. A. Mo.), 70 F. (2d) 976, aff. 72 F. (2d) 374, cert. den. Metropolitan Life Ins. Co. v. Trapp, 293 U. S. 596, 55 S. Ct. 112, 79 L. ed. 690 11

Statutes and Rules Cited.

New Rules of Federal Procedure, Rule 50 7
Missouri Constitution, Art. VI, Sec. 3, Am. 1884, Sec. 6. 11
Revised Statutes of Missouri 1929, Sec. 1907 11
Rules of this Court, Paragraph 1, Rule 12 2
Rules of this Court, Paragraph 2, Rule 38 1

IN THE

SUPREME COURT OF THE UNITED STATES.

LEWIS K. STONER,
Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

No. 1,000.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The petition for certiorari should be denied, because petitioner has failed to comply with Rule 38 of this Court in that he has not stated the statutory provision believed to sustain the jurisdiction of the Court.

Paragraph 2, Rule 38, of this Court provides as follows:

> "* * * The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question. (See Rule 12, par. 1) * * *."

Rule 12, paragraph 1, referred to therein, provides, in part, as follows:

> "• • • The statement shall refer distinctly (a) to the statutory provision believed to sustain the jurisdiction, • • •."

Petitioner's petition and suggestion in support thereof wholly fail to comply with the above rule in that they contain no statement of the jurisdiction of this Court. Under Rule 38 the petition should be denied.

II.

The Circuit Court of Appeals in deciding this case followed and properly applied the law of Missouri.

It is urged by petitioner that the Circuit Court of Appeals refused to follow and apply the law of Missouri to the facts in this case when it held that the evidence was insufficient to sustain a finding of total disability, and directed the District Court to enter judgment for the plaintiff. To determine this question it is necessary to first look to the facts in the record upon which the Circuit Court of Appeals based this finding.

The record discloses that the petitioner, insured, is actively engaged in the business of farming, operating a 200-acre farm and another 105-acre farm from which he has earned a living and a profit in addition (A. 49, 33). The facts with reference to the work he was able to do and did perform, set out in the opinion of the Court (Tr. 113), appear uncontradicted in the record, and the correctness of the statement by the Court is not denied by petitioner. From these facts, appearing in the evidence and from his personal observation of petitioner, the District Judge who heard the case after waiver of a jury expressly found and stated the disability of petitioner to be as follows (Tr. 99-100):

"* * * the defendant * * * was in court, however (he walked in during the progress of the trial), and we observed him carefully. (It is knowledge made famous by the oft-repeated tale that one can obtain a much clearer comprehension of the appearance and nature of an elephant by seeing one than by hearing the learned descriptions of even four eminent men of science.) We observed the defendant carefully. He walked into the court room, using a cane, but with only a slight limp, and with no expressions of pain. He appeared to be a strong, vigorous, healthy man, whose manner, features and appearance suggested intelligence above that of the average farmer. We have considered all of the testimony with the aid of this personal, visual, greatly significant observation.

"The whole truth of the matter is that as a result of his injury the defendant has a permanently stiffened ankle, that any extensive use of that ankle is now painful, so that it cannot be extensively used both because of the pain and because of the stiffness; that medical and surgical treatment possibly would remove entirely the pain element in the defendant's ankle condition. The only business in which the defendant has had training and experience is that of farming. He is not physically able, because of his injury and its consequences, to perform those farmer's tasks which require the more or less continuous and full use of both feet. That is the extent of his handicap."

It is insisted by petitioner that the decision below directing judgment to be entered for the plaintiff, respondent here, is in conflict with the Missouri law and particularly the decisions of *Stoner v. New York Life Insurance Company*, 90 S. W. (2d) 784, and *Stoner v. New York Life Insurance Company*, 114 S. W. (2d) 167; that these two decisions of the Kansas City Court of Appeals, which passed upon the policies here in question, are controlling upon the Court below and forbid the direction of a verdict for plaintiff. It is stated that these decisions are controlling upon

the Court, because "the evidence in those cases and the case at bar is identical" (Petitioner's Brief, p. 14). The record discloses that this statement is erroneous.

In addition to the evidence offered in those cases, which was reoffered in this case, there appears in the case at bar the following:

(1) The deposition of Lewis K. Stoner (Tr. 75), (2) the testimony of the witness Dr. H. J. Ryan (Tr. 85), and (3) the express finding of fact of the extent of the disability of the insured made from his personal observation of petitioner by the District Judge (Tr. 99-100). This record, therefore, is an entirely different record than the one before the Kansas City Court of Appeals in the cases cited. A very different situation is presented because this record contains the specific finding of fact as to the extent of petitioner's handicap made by the trial judge upon consideration of the evidence and his personal observation of the petitioner at the trial. A jury having been waived, this finding by the trial court stands in the same position as an answer to special interrogatories by the jury.

The ruling of the Kansas City Court of Appeals in the cases before it were made without the aid of the additional testimony in this record and without the finding of fact made by the trial judge, and therefore the cases are not controlling upon the court below in passing upon the present record.

In asserting that these decisions in the Kansas City Court of Appeals forbid the entry of a judgment for the plaintiff on this record, petitioner has wandered into error by assuming that the mere fact that he was held to have a submissible case under the state law requires the federal court to find for him. This is not true when the facts are weighed by the District Court sitting without a jury and expressly found in favor of the respondent. The mere

fact that there was a submissible case for a jury will not prevent an entry of judgment against the petitioner.

The Kansas City Court of Appeals, in the last case, 114 S. W. (2d) 173, where a general verdict was returned for petitioner, ruled that a jury might determine the extent of petitioner's disability and return a verdict under proper instructions. That case has never been retried. When the case at bar came on for trial a jury was waived and the case was tried before a court sitting without a jury. The trial court made special findings of fact, and from this evidence and personal observation specifically found and stated the extent of petitioner's disability (Tr. 99-100).

The Kansas City Court of Appeals, in holding that a submissible case was made where the special findings of fact appearing in this record did not appear, does not hold that the insurance company can never be entitled to win the case. The special findings made by the District Court serve the same purpose as answers to special interrogatories by a jury, and the case now stands as though it had been retried and the jury had found the facts, and the only thing that remains is to apply the law and determine whether or not the facts found constitute total disability.

The question then is, does the opinion at bar violate any rule of law announced by the Kansas City Court of Appeals in the *Stoner* case? The answer must be that it does not.

The Circuit Court of Appeals found that the record before it showed that petitioner "not only can, but does, substantially perform all the substantial and material acts necessary to the prosecution of the business in which the insured is engaged, and that such business returns a profit" (Tr. 117). This statement is based upon the facts found by the trial judge, who sat as a jury.

When the law as announced in the *Stoner* case and in *Heald v. Aetna Life Insurance Company*, 340 Mo. 1143, 104 S. W. (2d) 379, and every other case cited by the peti-

tioner, is applied to these facts it must be found that petitioner is not totally disabled.

Petitioner has again erred in assuming that, because the trial court found that he was physically unable to himself perform some farmer's tasks, that he is totally disabled as a matter of law. The Kansas City Court of Appeals ruled this against him in his last appeal, 114 S. W. (2d), l. c. 171, where it said:

> "• • •. We further held, 90 S. W. (2d) 784, loc. cit. 797, that the conceded inability of plaintiff to perform labor, which was part of his substantial duties, would not justify, as a matter of law, a verdict for the plaintiff; that plaintiff would not be entitled to recover, notwithstanding he could not perform farm labor by reason of his injuries, if he nevertheless had the ability to substantially perform his occupation by discharging duties other than farm labor. • • •"

The Court was there speaking of plaintiff's instruction which it there said singled out some duties of the plaintiff as a farmer and directed a verdict for him if the jury found he was unable to perform these duties. In discussing the instruction further the Court said (l. c. 172):

> "• • • The instruction is also clearly erroneous under the holding in the case of Heald v. Aetna Life Ins. Co., Mo. Sup., 104 S. W. (2d) 379. In that case it was held, in effect, that the fact that some substantial duties cannot be performed does not necessarily mean that the insured cannot substantially perform his occupation in its entirety • • •."

The trial court erred in applying the law to the special findings found by him. The Appellate Court accepted the findings of the trial court and correctly applied the Missouri law applicable thereto, as announced in the

Stoner Case, supra, and in the case of *Heald v. Aetna Life Ins. Co.*

We submit there is nothing in any Missouri decision in conflict with the law as applied to these facts. There has been no deprival of right to trial by jury, because a jury was waived, and the Appellate Court has made no assumption contrary to the special findings of fact made by the trial court sitting as a jury. The Circuit Court of Appeals properly found the conclusions of law of the District Court to be erroneous and, applying the Missouri law, reached the conclusion that the petitioner was not entitled to recover.

It is unquestionable that, if a general verdict is contrary to the special findings of fact under the applicable law, the Appellate Court can enter a proper judgment. Rule 50, New Rules of Federal Procedure. *Massachusetts Protective Ass'n v. Mauber,* 110 Fed. (2d) 203.

III.

There is no ruling by the Supreme Court of Missouri that the policies in question are not plain and unambiguous, and, therefore, subject to judicial construction.

Petitioner urges in point (d) of "Reasons Relied Upon for the Allowance of the Writ" that the Supreme Court of Missouri has held that this and like policies are ambiguous and subject to judicial construction, citing the cases of *State ex rel. New York Life Ins. Co. v. Shain; State ex rel. Metropolitan Life Ins. Co. v. Allen,* 337 Mo. 525, 85 S. W. (2d) 469; *State ex rel. Metropolitan Life Ins. Co. v. Hostetter,* 338 Mo. 589, 92 S. W. (2d) 122; *Bellows v. Travelers Ins. Co.* (Mo.), 203 S. W. 978.

It is urged that the Supreme Court of Missouri reviewed the ruling of the Kansas City Court of Appeals in *Stoner v. New York Life Ins. Co.,* 90 S. W. (2d) 784, and affirmed the holding of the Kansas City Court of Appeals

that the policies here in question were ambiguous and subject to construction (Petitioner's Brief, page 29).

The Supreme Court of Missouri did not review the ruling of the Kansas City Court of Appeals in *Stoner v. New York Life Ins. Co.*, 90 S. W. (2d) 784. The respondent in this cause requested the Supreme Court of Missouri to review that decision by filing a petition for writ of certiorari in the Supreme Court of Missouri. The application for the writ was denied without comment, opinion or ruling on any issue involved in the case. There are many reasons why the Supreme Court of Missouri in its discretion might have refused the writ. The application was probably premature, because no final judgment had been rendered, but the cause had simply been remanded by the Court of Appeals. *State ex rel. Duraflor Products Co. v. Pearcy*, 325 Mo. 335, 29 S. W. (2d) 83.

Regardless of the reason prompting the Supreme Court of Missouri to deny the petition for certiorari and thereby to refuse to review the ruling of the Kansas City Court of Appeals, it is well settled that denial by the Supreme Court of Missouri of a petition for a writ of certiorari to review the opinion of an inferior court is not an affirmance of the judgment of the inferior court in any respect. *State ex rel. Duraflor Products Company v. Pearcy*, 325 Mo. 335, 29 S. W. (2d) 83. In that case, supra, the Supreme Court of Missouri said on this subject:

> "But above and beyond the objections just mentioned is the fact that a writ of certiorari is not a writ of right (as regards private suitors), and that the issuance thereof rests in a sound judicial discretion. State ex rel. v. Dobson, 135 Mo. 1, 19, 36 S. W. 238, 243; State ex rel. v. Terte, supra, 320 Mo., loc. cit. 472, 8 S. W. (2d), loc. cit. 19; State ex rel. v. Pfeffle, 220 Mo. App. 676, 682, 293 S. W. 512, 515. A refusal of the writ in the exercise of that discretion cannot be taken as

> an adjudication on the right of the party to have it or on the merits of the controversy, such as makes these questions res judicata. 11 C. J., Sec. 385, p. 213; People ex rel. v. City of Kingston, 101 N. Y. 82, 91, 4 N. E. 348" [29 S. W. (2d), l. c. 87].

Therefore the assertion by petitioner that the Supreme Court of Missouri "ruled that the Kansas City Court of Appeals was right" is erroneous and a misconception of the legal effect of the denial of a petition for writ of certiorari.

The policy involved in this case is different from any of the policies considered by the Supreme Court in the other cited cases. In this policy after the regular form of disability provision, similar to those contained in the policies passed upon by the Supreme Court in other cases, there appears the additional provision:

> "If the insured performs any work or follows any occupation or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived."

The very purpose of placing this clause in the contract was to remove from this contract any doubt or uncertainty as to what the company undertook to do. The doubtful part of the other contracts ruled subject to judicial construction was whether or not the actual performance of work, although the insured was physically unable to do it, avoided liability under the policy. The part of the policy ruled subject to judicial construction was removed from this policy. The court below clearly distinguishes the policy in this case from the policy construed by the Supreme Court in *Heald v. Aetna Life Ins. Co.*, 430 Mo. 1143, 104 S. W. (2d) 379. In the concurring opinion it is said (Tr. 125):

"* * * This insurance contract states with exceptional clearness what the appellant company undertook to do. With explicit pains it confined its liability to cases where by the injury the insured is not only prevented from performing any work, but also 'from following any occupation or from engaging in any business for remuneration or profit.' The obvious purpose was thus to limit the scope of its responsibility. The majority opinion does not erroneously 'attempt to distinguish between the policies in suit and occupational insurance policies.' The distinction stands out clearly on the face of these policies. The purpose of the insurer to make that distinction is evident. It would be difficult to frame language more descriptive of that purpose. The majority opinion seeks only to give effect to the contract made."

The assignment that the opinion conflicts with the decision of the Supreme Court of Missouri, holding that the contracts in question are not plain and unambiguous and subject to judicial construction, is wholly without merit and affords no reason for the granting of the writ.

IV.

The opinion below is not in conflict with "the law of Missouri" and is not in conflict with the case of Erie Railroad Co. v. Tompkins.

As we have heretofore shown in point III hereof, the opinion sought to be reviewed is not in conflict with any decisions of the Supreme Court of Missouri. Neither is it in conflict with the decision of the Kansas City Court of Appeals in the case of *Stoner v. New York Life Ins. Co.*, 90 S. W. (2d) 784. Therefore, the statement in the decision that the Court is not bound to follow the decisions of the Courts of Appeals of Missouri is immaterial to the decision of the case and should not constitute grounds for the issuance of the discretionary writ of certiorari.

It is insisted by petitioner that under the ruling of this Court in the case of *Erie Railroad Co. v. Hilt*, 247 U. S. 97, the federal courts are controlled by decisions of the Courts of Appeals of Missouri because they declare the law of the state. The petitioner says (Brief page 16):

> "* * * If there be no prior contrary decisions of the Supreme Court, the decisions of any of the three courts of appeals, right or wrong, are conclusive even upon the Supreme Court on certiorari and upon all nisi prius courts. In such circumstances they are the highest courts of the state. * * *"

Petitioner has erred in this statement. The decision of a Court of Appeals of Missouri is not binding upon all nisi prius courts of the state. There are three Courts of Appeals districts in Missouri. A decision of any of the Courts of Appeals is binding only upon the nisi prius courts of the district of the court rendering the decision. The pronouncement of a Court of Appeals is not governing law for the other nisi prius courts of the state, nor for the other Courts of Appeals, and, of course, not for the Supreme Court. Const. of Mo. Am. 1884, Sec. 1907, R. S. Mo. 1929.

The Supreme Court of Missouri is the highest court of the state and it is the only court which can declare the law binding upon all other courts of the state. Mo. Const., Art. VI, Sec. 3, Am. 1884, Sec. 6; *Poe v. Illinois Central R. Co.*, 339 Mo. 1025, 99 S. W. (2d) 82; *Trapp v. Metropolitan Life Ins. Co.* (U. S. C. C. A. Mo.), 70 F. (2d) 976, aff. 72 F. (2d) 374, cert. den. Metropolitan Life Ins. Co. v. Trapp, 293 U. S. 596, 55 S. Ct. 112, 79 L. ed. 690.

In the latter case, in which certiorari was denied by this Court, the Circuit Court of Appeals, in speaking of the Missouri courts, said (70 F. [2d], l. c. 979):

> "The highest court of Missouri is the Supreme

> Court. Its decisions are controlling upon the three Courts of Appeals of that state (Const. Mo., Art. VI [Amendment of 1884], Sec. 6), and decisions of such Courts of Appeals have not the force of stare decisis with the Supreme Court (Sedalia v. Donohue, 190 Mo. 407, 415, 89 S. W. 386, 4 Ann. Cas. 89; Paddock v. Railway, 155 Mo. 524, 534, 56 S. W. 453), nor even as establishing the 'law of the case' (Paddock v. Railway, 155 Mo. 524, 534, 56 S. W. 453; Hennessy v. Brewing Co., 145 Mo. 104, 115, 46 S. W. 966, 41 L. R. A. 385, 68 Am. St. Rep. 554). Hudson v. Maryland Casualty Co. (C. C. A. 8), supra, 22 F. (2d) 791, 792."

As said by the petitioner, it is true that the decisions of the respective Courts of Appeals may be in direct conflict. The decisions of each are binding upon the lower courts of their respective districts. Until the Supreme Court has spoken there is no law of the state.

This Court in the *Erie* case held that federal courts were only bound by the state law "* * * declared by its Legislature in a statute, or by its highest court in a decision * * *."

The Supreme Court of Missouri is the highest court in the state and the only court in this state which can declare the law binding on all the courts of the state. Since a decision of the Court of Appeals is not binding on all of the courts of the state, it cannot be said to declare the law of Missouri absent a ruling by the Supreme Court. A decision of a court of appeals of Missouri, therefore, is not one which *must* be followed by a federal court under the ruling of this Court in the *Erie* case.

This Court in the recent case of *Russell v. Todd*, ... U. S. ...., 60 S. Ct. 527, 84 L. ed. 517, l. c. 523 (1940), ruled that absent a definite ruling by the *highest court* of the state, this Court would accept the decision of an appellate court *as persuasive*. This recent announcement from this Court clearly holds that while decisions of appellate courts

of a state are persuasive upon federal courts, and may be and are often followed, yet it is only the opinions of the *highest court* of the state which the federal court is *compelled* to follow under the ruling in the *Erie* case, supra. The case of *Erie Railroad Company v. Hilt*, 247 U. S. 97, cited and relied upon by petitioner, goes no further than the recent pronouncement in the *Russell* case, supra.

We submit that the ruling of the court below that it was not required to follow the decision of the appellate courts of Missouri is not in conflict with the pronouncement of this Court in the *Erie* case and the *Russell* case, supra.

V.

There is no important question of local law or of the common law involved in the decision of this case.

It is urged by petitioner in point (b) of his reasons relied upon for the allowance of the writ that the court below has erroneously decided an important question of local law contrary to the law of the state. Both the opinion and petitioner's suggestions disclose that no important question of local law or of the common law is involved in this decision. The only question involved is whether or not the facts in this particular record support the conclusions reached by the Court. The court below, in its opinion, has stated and recognized the law of Missouri, and the only controversy is merely a dispute over facts disclosed by the record, all of which have been specially found by the District Court, and no complaint was made thereto. This falls far short of a decision upon an important question of local law. This reason urged by petitioner for the granting of the discretionary writ by this Court is not supported by the record.

VI.

The amount involved is more than three thousand dollars ($3,000.00) and the federal courts have jurisdiction.

It is admitted in petitioner's answer that disability benefits in controversy amounted to two thousand three hundred seventy-five dollars ($2,375.00), and that premiums have been paid on the policies in controversy in the amount of seven hundred ninety dollars and seventy cents ($790.70). The petitioner, however, denied in his answer that he had ever claimed a refund of the premiums; denied that he "is demanding the same *now*," and denied that any controversy exists or has existed in respect to the premiums. However, he does not state that he will not claim the premiums if successful in establishing total disability.

The right to return of the premiums involved in this controversy has been settled by the Circuit Court of Appeals for the Eighth Circuit in the case of *Lydon v. New York Life Ins. Co.*, 89 Fed. (2d) 78. There it is held upon identical policy provisions that premiums must be refunded by the insurer if total disability is established, even though paid without protest by the insured. Consequently, if successful in this declaratory judgment action upon consequential relief, the petitioner will be entitled to the return of these premiums as a matter of right under the *Lydon Case, supra.* Under the rule in the *Lydon Case,* the controversy with reference to the disability benefits, necessarily includes premiums paid upon the policy during the time of alleged disability. That more than three thousand dollars ($3,000.00) is actually in controversy is beyond question, and the opinion of the Circuit Court of Appeals is not subject to question on that account.

CONCLUSION.

In conclusion, it is respectfully submitted that the court below correctly ruled the case upon the record before it; that its decision is in accord with, and follows the law of Missouri, and that it is not in conflict with any decision of the Supreme Court of Missouri. The decision passes upon no important question of local law or of the common law. None of the reasons assigned by petitioner for the issuance of the writ are well founded and no reason can be found in the record which should induce this Court to exercise its discretion and call this case before it for review.

Respectfully submitted,

BOYLE G. CLARK,
PAUL M. PETERSON,
WILLIAM H. BECKER,
Columbia, Missouri,
Counsel for Respondent.

LOUIS H. COOKE,
New York City,
Of Counsel.

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 5 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 74.

LEWIS K. STONER, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

RESPONDENT'S BRIEF.

BOYLE G. CLARK,
PAUL M. PETERSON,
WILLIAM H. BECKER,
Columbia, Missouri,
Attorneys for Respondent.

LOUIS H. COOKE,
New York City,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

Blank Page

INDEX.

	Page
Statement	1
Opinion Below	1
The Judgment of the District Court	2
The Petition for Certiorari	2
History of Litigation	4
The Contracts Involved	6
Evidence on Question of Disability	7
Facts Found by the Court of Appeals	12
Argument	14
Summary of Respondent's Argument	14
I. The judgment of the Circuit Court of Appeals under review, construing and applying the law of Missouri, is not in conflict with the law as declared by the Kansas City Court of Appeals in the companion cases	16
The Kansas City Court of Appeals would come to the same conclusion as the Circuit Court of Appeals upon the facts found by the District Court	17
II. The opinion of the Circuit Court of Appeals is in harmony with the decisions of Missouri's highest court, its Supreme Court	18
He was actually engaged in the business of farming and the work of farming for profit under circumstances disentitling him to benefits under the provision of the contract that "if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived"	20

III. The opinion of the Circuit Court of Appeals follows the law of Missouri as declared by the St. Louis Court of Appeals and the Springfield Court of Appeals, courts of equal rank with the Kansas City Court of Appeals..... 23

IV. The Circuit Court of Appeals was not bound to follow the opinions of the Kansas City Court of Appeals in the companion cases. The Kansas City Court of Appeals is not a court of last resort in any case. It is not a court of general territorial jurisdiction in Missouri. Its territorial jurisdiction is limited to one of three districts. Its judgments are of no higher authority than those of the Springfield Court of Appeals and the St. Louis Court of Appeals, coordinate courts exercising jurisdiction in different territories. All final judgments of any of the courts of appeals are reviewable by the Supreme Court of Missouri on certificate or by certiorari. Under the doctrine of the Erie case, the Federal Courts are not required to follow decisions of such a court..... 31

1. The place of the Kansas City Court of Appeals in the Missouri judicial system..... 32
2. Petitioner's theory would deprive Respondent of its ultimate right to have the opinions of the Court of Appeals reviewed in the light of the decisions of the Supreme Court of Missouri..... 36

V. There is no ruling by the Supreme Court of Missouri affirming the judgment of the Kansas City Court of Appeals in 90 S. W. (2d) 784..... 37

VI. Petitioner was not totally and permanently disabled during the period involved..... 39

1. "Business defined"..... 42
2. The activities of Petitioner as disclosed by the record show him engaged in business for remuneration or profit..... 44

3. The Petitioner and not his money is actually engaged in business 49
4. The Petitioner under his own evidence is able to perform all the duties of his business as now conducted by him 53

VII. It is established that the amount in controversy exceeds $3,000.00 54

Conclusion 55

Cases Cited.

Behen v. St. Louis Transit Co., 186 Mo. 430, l. c. 440-441, 85 S. W. 346 53
Bellows v. Travelers Ins. Co. (Mo.), 203 S. W. 978 37
Berry v. Equitable Fire and Marine Ins. Co., 317 Mo. 1119, 298 S. W. 63 34
Buis v. Prudential Ins. Co., 229 Mo. App. 190, 77 S. W. (2d) 127 19
Collins v. Truman (Mo. App.), 14 S. W. (2d) 526: 43
Eden v. Metropolitan Life Insurance Company (1940) (Mo. App.), 138 S. W. (2d) 745 28
First National Bank & Trust Company of Bridgeport, Conn., v. Beach, 301 U. S. 435, 441, 57 S. Ct. 801, 81 L. Ed. 1206, 86 Fed. 88 46
Florida National Bank et al. v. Evans, 28 Fed. (2d) 67 46
Foss v. Commissioner of Internal Revenue, 75 Fed. (2d) 326 ..... 43, 44, 52
Heald v. Aetna Life Insurance Company, 340 Mo. 1143, 104 S. W. (2d) 379 ..... 18, 19, 20, 40
James v. United States Casualty Co., 113 Mo. App. 622 19
Jones v. Metropolitan Life Insurance Company (1939) (Mo. App.), 130 S. W. (2d) 967 24
Katz v. Union Central Life Ins. Co., 226 Mo. App. 618, 44 S. W. (2d) 250, l. c. 252 19
Lydon v. New York Life Insurance Company, 89 Fed. (2d) 78 (C. C. A. 8th) 54
McCoy v. Home Oil and Gas Co. (Mo. App.), 60 S. W. (2d) 715, l. c. 724 53
M. K. & T. Ry. Co. v. Smith, 154 Mo. 300 34

New York Life Ins. Co. v. Stoner, 92 Fed. (2d) 845.... 5
Paetz v. London Guarantee and Accident Co., Ltd. (Mo. App.), 71 S. W. (2d) 826, l. c. 828..... 53
Pitts v. Maupin, 230 Mo. App. 221, 88 S. W. (2d) 384.. 44
Plant v. Walsh, 280 Fed. 722.....43, 44
Smith v. Metropolitan Life Insurance Company (1937) (Mo. App.), 108 S. W. (2d) 995..... 26
State ex rel. City of Stanberry v. Smith, 172 Mo. 618.. 34
State ex rel. Commonwealth Casualty Co. v. Cox, 322 Mo. 38, 14 S. W. (2d) 600..... 22
State ex rel. Duraflor Products Co. v. Pearcy, 325 Mo. 335, 29 S. W. (2d) 83.....34, 38
State ex rel. Gilman v. Robertson, 264 Mo. 661..... 34
State ex rel. Metropolitan Life Ins. Co. v. Allen, 337 Mo. 525, 85 S. W. (2d) 469..... 37
State ex rel. Metropolitan Life Ins. Co. v. Hostetter, 338 Mo. 589, 92 S. W. (2d) 122..... 37
State ex rel. Prudential Life Ins. Co. v. Shain (Mo. Sup.), 127 S. W. (2d) 675.....22, 23, 36, 37
Stoner v. New York Life Insurance Co. (Mo. App.), 90 S. W. (2d) 784.....4, 5, 6, 22, 23, 34, 35, 36, 37
Stoner v. New York Life Ins. Co., 232 Mo. App. 1048, 114 S. W. (2d) 167.....5, 16, 18, 30
Washburn v. Commissioner of Internal Revenue, 51 Fed. (2d) 949.....43, 44, 50, 51
Wulbern v. Drake, 120 Fed. 493..... 47
Young v. Travelers Ins. Co., 80 Maine 244, l. c. 247, 13 Atl. 896..... 19

Constitution and Statutes Cited.

Missouri Constitution of 1875 and Amendments of 1884 and 1890.....32, 33
Revised Statutes of Missouri 1929, Secs. 1889, 1897, 1907..... 33

Textbooks Cited.

12 C. J. S., p. 765..... 42
Webster's New International Dictionary..... 42

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 74.

LEWIS K. STONER, Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY.

RESPONDENT'S BRIEF.

STATEMENT.

OPINION BELOW.

This is a proceeding to review by writ of certiorari the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the cause of New York Life Insurance Company, a corporation, Appellant, v. Lewis K. Stoner, Appellee, which is docketed as Cause No. 11,450 in that Court. The case is reported in 109 Fed. (2d) beginning at page 874.

The three opinions of the Circuit Court of Appeals are found in the Transcript of Record at pages 105 to 124. The principal opinion of Judge Dewey begins at page 105 of the Transcript. The dissenting opinion of Judge

Thomas begins at page 113 of the Transcript. The opinion of Judge Van Valkenburgh, concurring in the principal opinion of Judge Dewey, begins at page 120 of the Transcript.

THE JUDGMENT OF THE DISTRICT COURT.

The "Memorandum Opinion, Findings and Conclusions, Declaratory Judgment" rendered by the district court are set out in the Transcript at pages 95 to 100. In this memorandum opinion the District Judge made specific findings of fact with respect to the alleged disability of the insured. After stating his conclusion of the law applicable (Tr. 99) the District Court made a general finding of fact in favor of the insured upon the ultimate issues involved and rendered a declaratory judgment (Tr. 100) in favor of the insured which was reversed by the Circuit Court of Appeals (Tr. 124).

THE PETITION FOR CERTIORARI.

On October 14, 1940 (Tr. 128), this Court granted a petition for writ of certiorari and assigned this case for argument immediately following cause No. 45, which involved a question similar to that said to be involved here.

The reasons relied upon for the allowance of the writ are set out in the petition therefor at pages 7 to 11 thereof. The reasons are as follows:

> (a) "The court below erroneously held that it was bound to look only to the decisions of the Supreme Court of Missouri to ascertain the law of the state; that the Missouri courts of appeals were 'intermediate courts' and in determining what is 'the law of the state' within the meaning of the Erie case it was not bound to follow the decisions of those courts; and it refused to follow them."

(b) "The court below has erroneously decided an important question of local law not only directly contrary to the decisions of the Kansas City Court of Appeals in actions between the same parties on the same subject and on identical facts, but also contrary to the settled law of the state declared with unanimity by its three courts of appeals (Kansas City, St. Louis and Springfield) in an unbroken line covering more than a third of a century."

(c) "The decision of the court below is erroneous in that it ignores and fails to follow the decisions of the Supreme Court of Missouri approving and citing as authority the decisions of the courts of appeals and promulgating the identical rule of law to determine 'total disability' announced by those courts."

(d) "In ruling that the policies are plain and unambiguous and not open to interpretation, the decision of the court below is erroneous and in conflict with the decisions of the Supreme Court of Missouri as well as the decisions of all of its courts of appeals."

(e) "The majority opinion as to the facts is opposed to the undisputed facts in the record and its conclusion upon the facts stated is erroneous and contrary to the decisions of the Missouri cases."

(f) "Without any evidence to show that the amount in controversy exceeded the jurisdictional amount which was put in issue by the answer the court below erroneously directed the district court to enter a declaratory judgment as prayed in favor of respondent."

The assignment of this case for argument following Case No. 45, **West v. American Telephone and Telegraph Company**, indicates that the chief interest of the Court in the review of the decision of the Circuit Court of Appeals involves the question of whether or not the Missouri law was properly applied and due regard was given by the Circuit Court of Appeals to the opinions of the Kansas City Court of Appeals hereinafter referred to.

HISTORY OF LITIGATION.

This action for a declaratory judgment is one of a series of cases growing out of the controversy, arising in September, 1933, between the Petitioner and Respondent over the existence of total and permanent disability. The Petitioner was injured June 29, 1931, and received on the contracts here involved, the monthly income and waiver of premium benefits on account of total and presumably permanent disability until September 29, 1933. Without dispute until September 29, 1933, the Respondent paid Petitioner $3,375.00 in monthly income benefits at the rate of $125.00 per month, and Respondent also waived premiums during this period totaling $864.65 (Tr. 35-36). Before any payment was made for October, 1933, Petitioner was notified that he was no longer considered continuously totally disabled and that no further income payments would be made or premiums waived (Tr. 81).

Thereafter, the Petitioner filed an action in the Circuit Court of Buchanan County, Missouri, against Respondent to recover disability benefits from September 29, 1933, until March 24, 1934. This was tried, resulting in a jury verdict and judgment for Respondent. This judgment was reversed and remanded by the Kansas City Court of Appeals. **Stoner v. New York Life Insurance Co.** (Mo. App.), 90 S. W. (2d) 784. That action is still pending and has not been retried.

Upon the reversal of the judgment in its favor by the Kansas City Court of Appeals and the remand of the cause for a new trial, Respondent herein filed an application for certiorari in the Supreme Court of Missouri to review the opinion and judgment of the Kansas City Court of Appeals. The application for certiorari is set out at page 47 of the petition for the writ in this case. This application for certiorari was denied by the Supreme Court

of Missouri. The order of denial is set out at page 53 of the petition for the writ in this case. Petitioner intimates that the denial of this petition by the Supreme Court of Missouri was a review and affirmance of the opinion of the Kansas City Court of Appeals on the first appeal (90 S. W. [2d] 784). There is no merit in this contention. (See Point V hereof.)

In June, 1936, Petitioner instituted separate actions simultaneously in the Circuit Courts of Buchanan and Platte Counties, Missouri. Each of these last actions was founded upon two of the four policies and sought benefits for the period commencing April 29, 1934, and ending May 29, 1936. The Platte County case was sent to Davies County on a change of venue, where it was subsequently tried. Upon the filing of these last two suits, Respondent, insurer, filed a suit in equity in the United States District Court for the Western District of Missouri to restrain the prosecution of the actions pending in state courts and to secure a determination in the District Court on the issue of the total disability alleged to be common to all suits. The District Court dismissed this suit and its judgment was affirmed by the Court of Appeals of the Eighth Circuit. **New York Life Ins. Co. v. Stoner,** 92 Fed. (2d) 845.

In the meantime the state court action, sent to Davies County on a change of venue from Platte County, was tried, resulting in a jury verdict for Petitioner, the insured. This judgment was reversed and remanded by the Kansas City Court of Appeals. **Stoner v. New York Life Ins. Co.,** 232 Mo. App. 1048, 114 S. W. (2d) 167, and the cause remanded to the Davies County Circuit Court for retrial, where it is now pending.

On January 8, 1938, about three weeks before rendition of the opinion of the Kansas City Court of Appeals reported in 114 S. W. (2d) 167, this action was instituted (Tr. 1).

No further trials have been had in the state courts pending the final determination of this action. The reported opinions cited hereinabove may be resorted to for further details.

THE CONTRACTS INVOLVED.

Except for amounts, the total and permanent disability provisions of each of the four contracts of insurance involved are identical. The pertinent provisions with reference to total and permanent disability are as follows (Tr. 21-23):

> "Total and Permanent Disability.
>
> "**Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit,** provided such disability occurred after the insurance under this policy took effect and before the anniversary of the policy on which the insured's age at nearest birthday is sixty. Upon receipt at the Company's home office, before default in payment of premium, of due proof that the insured is totally disabled as above defined, and will be continuously so totally disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted:
>
> * * * * * * *
>
> "Before making any income payment or waiving any premium the Company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnsh such proof, **or if the insured performs**

any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived." (Emphasis ours.)

In the applications for the policies, Petitioner stated that his occupation was that of a "farmer" and "farming." In response to the words, "State exact duties in full," Petitioner stated in two of the policies, "Owns and operates grain and stock farm," and in the remaining two, "Owner and manager general farm" (Tr. 23, 24).

EVIDENCE ON QUESTION OF DISABILITY.

Evidence on the question of disability consisted of testimony preserved in the printed transcripts of the cases tried in Buchanan and Davies Counties, Missouri, and appealed to the Kansas City Court of Appeals, with the exception of the deposition of Petitioner and the oral testimony of Dr. Ryan offered by Petitioner. Testimony so offered under stipulation (Tr. 19, 20) was that of Petitioner, his brother, L. C. Stoner, his physician, Dr. J. A. Gray, and physicians Dr. Gregg Thompson and Dr. Charles Settles. The latter two testified for the Respondent.

The physical condition of Petitioner at the time of the trial and during the period involved in this action was fairly summed up from all the evidence by the trial court as follows (Tr. 97, 98):

> "We observed the defendant carefully. He walked into the court room, using a cane, but with only a slight limp, and with no expressions of pain. He appeared to be a strong, vigorous, healthy man, whose manner, features and appearance suggested intelligence above that of the average farmer. We have considered all of the testimony with the aid of this personal, visual, greatly significant observation.

> "The whole truth of the matter is that as a result of his injury the defendant has a permanently stiffened ankle; that any extensive use of that ankle is now painful, so that it cannot be extensively used both because of the pain and because of the stiffness; that medical and surgical treatment possibly would remove entirely the pain element in the defendant's ankle condition. The only business in which the defendant has had training and experience is that of farming. He is not physically able, because of his injury and its consequences, to perform those farmer's tasks which require the more or less continuous and full use of both feet. That is the extent of his handicap."

Since 1934 Petitioner has received no treatment for his injury. (Tr. 52).

The pain which he suffers on walking, he testified, "isn't pain that you can't stand, it's just a pain that bothers you."

Petitioner, age 42 at the time of the trial, had been a farmer all of his life, had a country grammar school education and had no experience or training in any other work except that of farming (Tr. 24). At the time of his injury in 1931 Petitioner lived upon what was known as the Estate Farm, consisting of about 200 acres. Petitioner's mother owned this farm during her life and rented it to Petitioner under an agreement whereby, out of the annual income of the farm, operating expenses, taxes and insurance were paid, then Petitioner and his mother were paid the living expenses of each and the profits remaining divided between them (Tr. 26-31, 48, 49).

Since September, 1933, and during the period covered by this suit, Petitioner has earned his livelihood out of the farming of the Estate Farm, and in addition has made profits which he has divided with his mother. Petitioner's livelihood was earned in consideration of the services rendered in the operation of the farm (Tr. 48). Petitioner

says he manages the farm for himself as tenant under a business-like arrangement just as if it were rented from another (Tr. 47, 48). He has continued in charge of the operation of the Estate Farm since his injury, and during the period involved in this suit.

In addition to the Estate Farm, Petitioner has operated, in connection with the Estate Farm, a 105-acre farm adjacent to the Estate Farm and owned by him (Tr. 26, 31).

At the time of his injury Petitioner was interested in two other farms, one of which he owned jointly with his brother and the other he owned jointly with his mother. He leased to his brother his interest in the farm they owned together, until 1935, when he sold his interest to his brother (Tr. 30). Prior to his injury Petitioner had charge of the leasing and handling of the farm owned with his mother, sanctioning the manner of its farming, making settlements, authorizing repairs and collecting the rentals. He continued to handle this farm in the same manner after his injury until 1936, when he and his mother sold that farm (Tr. 30).

The Estate Farm, which Petitioner is now operating, and upon which he is now living, was operated by him as a grain and stock farm prior to his injury. He bought live stock (cattle and hogs) from others, fed the produce of the farm to them, and sold the live stock for profit. Since his injury Petitioner has continued to operate the Estate Farm as a grain and stock farm, buying live stock and feeding them the feed raised on the farm, and selling them for profit (Tr. 32). Prior to his injury Petitioner had two men regularly employed on the Estate Farm, but since his injury has had only one man regularly employed. This, he says, resulted from the displacement of horses and mules with a tractor and more modern farming machinery. Both before and after his injury additional help was called in during rush seasons (Tr. 32).

Prior to his injury Petitioner assisted his hired men at times in performing the manual labor on the farm, assisted with the chores, preparation of the ground, plowing, feeding stock, sowing, scooping grain, operating mowing machines, planters, binders and the harrow. Since his injury he has been unable to do any of the physical labor, and it has been done by his hired man without Petitioner's physical assistance, but under his direction and supervision (Tr. 26-28). Prior to Petitioner's injury the hired man, Amphor, was charged with the responsibility of looking after the operations on the farm, with the help of Petitioner. Since the injury Amphor has continued to be responsible for the operation of the farm the same as before except for Petitioner's physical assistance (Tr. 32, 33). In this connection Amphor is the only hired hand remaining, and he is furnished a place to live and a garden and paid $9.00 a week (Tr. 34). Prior to his injury Petitioner depended, in the operation of the Estate Farm, upon Amphor, whom he called his "right-hand man," and since his injury has continued to depend upon him in those operations (Tr. 33).

With reference to management and operation of the farm, Petitioner, since his injury, has continued to feed cattle and hogs and sell them just as before his injury, for the purpose of making a livelihood out of the farm. Since his injury he has continued to attend personally to the purchase of live stock in Omaha and St. Joseph, and to the sale of the stock after feeding them (Tr. 34-35). He has driven his car to Omaha to the stockyards, and St. Joseph, distances of 90 to 100 miles, and has traded and sold stock on the markets in Omaha and St. Joseph (Tr. 36-37). He has continued to observe the live stock on the farm, looking after and keeping himself informed and acquainted with the stock (Tr. 37). Since his injury he has gone out in the alfalfa fields, consulted with his man about weather

conditions and the cutting of the alfalfa, and has driven his car out in the field to look after the crops. He can drive his car wherever a binder or a mowing machine can go (Tr. 37-38). Both prior and since his injury, extra labor in season has been hired, contracted with and paid personally by Petitioner. Prior and since his injury Petitioner has planned the planting and rotation of crops and method of operating the farm and the buying of live stock and the making of deals to secure stock to feed, all personally (Tr. 38-39). He has bought stock at both Omaha and St. Joseph, and from neighbors (Tr. 39). He has followed the same general practice since his injury as before in determining when cattle were ready for the market, has determined when and how they should be shipped. Prior to his injury he directed the feedings of the hogs, the manner of their feeding and what they should be fed and helped feed them. Since his injury he has continued to direct the feeding of the hogs (Tr. 39-40). He has continued since his injury, as before, to make the plans and give the orders with reference to the buying and raising of cattle on the farm. In the spring, when it comes time to plow, the work has to be managed and supervised and Petitioner has attended to the direction of the plowing himself (Tr. 40). Since his injury he has continued, as before, to make the arrangements and hire the trucks to haul the stock to market, and he can drive as far as the market himself (Tr. 40-41). Since his injury he has continued, as before, to buy the seed and determine the character of the seed to be sown. Such stock as has been sold locally since his injury has been sold by Petitioner, who carries on the negotiations and consummates the sales personally. Since the injury Petitioner hires a man to assist Amphor in doing the physical work which Petitioner formerly did, but it has not been necessary to have him there all the time, there having been only one man regularly employed (Tr. 43-44).

When the stock is shipped to the St. Joseph or Omaha markets by truck, Petitioner goes to market with them, riding in the truck, driving his own car or going with someone else (Tr. 44). He trades with the same commission house as before (Tr. 45).

There is nothing the matter with Petitioner's right leg, left knee, left thigh, internal organs, spine, hips, back, ribs, heart, stomach, left hand, left wrist, left upper arm, left elbow, left shoulder, right shoulder, right upper arm, right forearm, right hand, right wrist, neck, head, eyes, throat or mind (Tr. 54-55, 30).

Petitioner's brother corroborated Petitioner's testimony as far as he had knowledge (Tr. 54-56). Petitioner testified by deposition that his condition has continued the same as it was when he testified in the Davies County trial at Gallatin, Missouri, except that his left leg has gotten smaller. The medical testimony of both Petitioner and Respondent generally corroborated findings of the trial court with reference to the physical condition of the Petitioner at the time of the trial. The Respondent requested conclusions of law I and II, and the request for special findings of fact I, II, III, IV, V, VI and VII (Tr. 92-93); all were denied by the trial court and exceptions allowed.

FACTS FOUND BY THE COURT OF APPEALS.

In reversing the judgment of the District Court, the Circuit Court of Appeals accepted the facts with reference to Petitioner's condition as found and set out by the trial court in its memorandum and findings (Tr. 106-107). Without exhaustively reviewing the evidence the Circuit Court of Appeals, in the opinion of Judge Dewey, outlined the activities of the insured in the conduct of his business as reflected by the undisputed evidence (Tr. 108-109). These facts were an amplification of the facts specifically found by the District Court and were in no way contrary thereto.

Nor were the facts set out in Judge Dewey's opinion in dispute; in fact, they were all gleaned directly from the testimony of the insured himself. About them there is no doubt. Judge Van Valkenburgh, in his concurring opinion (Tr. 124), correctly stated that there was no room for disagreement as to the weight of the evidence in respect to the facts which form the basis of the majority opinion.

In his dissenting opinion Judge Thomas made some statements of facts, not found by the trial court and not supported by the record but actually in conflict with both the undisputed record and the findings of the trial court (Tr. 119).

ARGUMENT.

SUMMARY OF RESPONDENT'S ARGUMENT.

It is the position of the respondent in this case—

That the judgment of the Circuit Court of Appeals is not in conflict with the law of Missouri;

That the opinions of the Kansas City Court of Appeals in the companion cases do not conflict with the judgment of the Circuit Court of Appeals;

That the conclusion of the Circuit Court of Appeals is in harmony with the law as announced by the Supreme Court of Missouri;

That the conclusion reached by the Circuit Court of Appeals is in harmony with the opinions of the three Missouri Courts of Appeals;

That if the opinions of the Kansas City Court of Appeals are construed to be in conflict with the conclusion of the Circuit Court of Appeals, the opinions of the Kansas City Court of Appeals are then in conflict with the opinions of the Springfield Court of Appeals and the St. Louis Court of Appeals and the Supreme Court of Missouri, and do not represent the law of the State of Missouri.

With respect to the alleged duty of the Circuit Court of Appeals to consider itself bound by the Kansas City Court of Appeals, the respondent submits (1) that the Circuit Court of Appeals in applying the law of Missouri is not bound by any particular opinion of any Missouri Court of Appeals, but should give an opinion of a Missouri Court of Appeals only such weight as it would receive in other courts of its state and only such weight as it would receive as a determination of the law by the Supreme Court of Missouri; (2) that where there are conflicting opinions be-

tween the Courts of Appeals of Missouri, the Federal Courts must exercise their best judgment to determine which view will ultimately prevail when the matter is passed upon by the Court of last resort, the Supreme Court of Missouri; (3) that even where there are no conflicting opinions of the other Courts of Appeals the Federal Courts are not duty bound to follow an opinion of the Kansas City Court of Appeals but may and should evaluate that opinion in the light of the decisions of the Supreme Court of Missouri and try to determine what the Supreme Court of Missouri will say when the precise question is presented; (4) that opinions of the Supreme Court of Missouri prevail over opinions of the Courts of Appeals in conflict therewith.

Believing that the judgment of the Circuit Court of Appeals must be affirmed under the Missouri cases relied upon by Petitioner, Respondent submits that there is not involved in this case any conflict with or disregard of the controlling opinion of any Missouri court. Under no conception of the law of Missouri can the conclusion of law announced by the District Court, and sought to be upheld by Petitioner, be justified. With the specific facts found by the District Court Respondent not only has no quarrel, but bases its right to relief thereon. Of course, the ultimate conclusion of the District Court on the mixed question of law and fact (that of total and permanent disability) is not accepted because of the District Court's misconception of the law which resulted in the erroneous ultimate declaratory judgment (Tr. 100).

With respect to the ground stated in the petition for the writ of certiorari that an amount sufficient to give the District Court jurisdiction is not involved, Respondent submits that there is no merit to this assignment. Over $3,000.00 in disability benefits by way of monthly income and premium waivers were directly involved. In fact,

judgment was rendered therefor (Tr. 100), and this is recognized in the petition for the writ (II, p. 13).

I.

The judgment of the Circuit Court of Appeals under review, construing and applying the law of Missouri, is not in conflict with the law as declared by the Kansas City Court of Appeals in the companion cases. Stoner v. New York Life Insurance Company (Mo. App.), 90 S. W. (2d) 784; Stoner v. New York Life Insurance Company, 232 Mo. App. 1048, 114 S. W. (2d) 167.

If the Circuit Court of Appeals in the judgment under review has rendered a decision that is in harmony with the opinions of the Kansas City Court of Appeals in the companion cases, there is no occasion to determine the weight which must be given opinions of Missouri intermediate appellate courts.

In this case Respondent submits that this opinion of the Circuit Court of Appeals is in harmony with the opinions of the Kansas City Court of Appeals.

In the first case, reported in 90 S. W. (2d) 784, the Kansas City Court of Appeals reversed a general verdict in favor of the respondent insurer because of error in the instructions to the jury. In that appeal it was held that the plaintiff made a submissible case, i. e., that a jury **might** find total and permanent disability on the evidence there presented. It did not hold that the jury **must** find total and permanent disability. It did not hold that a verdict for the defendant would be unjustified by the evidence.

In the second appeal of a companion case, the Kansas City Court of Appeals reversed a general verdict in favor of Petitioner, the insured (232 Mo. App. 1048, 114 S. W. [2d] 167). This reversal was caused by error in the instructions. On this appeal it was conclusively shown that

the Kansas City Court of Appeals thought that the evidence would justify a verdict **either way.** Otherwise it would have affirmed the verdict and judgment as being for the right party despite error in instructions.

From these opinions it clearly appears that the Kansas City Court of Appeals held that whether the ultimate findings should be in favor of the insured or the insurer **depends upon the specific facts found by the trier of the facts.**

In the case at bar the cause was tried before the District Court upon the waiver of a jury with the District Court sitting as the trier of the fact. And the District Court did not return to the Circuit Court of Appeals a general verdict such as a general jury verdict, but made specific and definite findings of fact. Would the Kansas City Court of Appeals hold that the insurer was not entitled to a judgment upon the specific facts found by the District Judge? We submit that the Kansas City Court of Appeals would, upon those specific findings of fact, find in favor of the insurer. If so, this case does not deserve further consideration by this Court, and the judgment of the Circuit Court of Appeals should be affirmed.

The Kansas City Court of Appeals would come to the same conclusion as the Circuit Court of Appeals upon the facts found by the District Court.

It is evident from the opinion of the Kansas City Court of Appeals on the last appeal of a companion case that the insured petitioner could not recover if he could conduct his business and engage in his occupation by doing things other than farm labor. The record and the facts as found by the District Court and the Circuit Court of Appeals leave no doubt that the insured was engaging in his occupation and business by doing things other than physical labor. In fact, he so testified himself. And he was not

only earning a living as a result of his operation of the rented farms and his own labor, but he was making a profit in addition, which he divided with his landlord under contract.

Under the following language of the Kansas City Court of Appeals on the last appeal, it seems clear that the Kansas City Court of Appeals would have denied recovery itself upon the facts found by the District Judge (Stoner v. New York Life Insurance Company, 232 Mo. App. 1048, 114 S. W. [2d] 167):

> "We further held, 90 S. W. (2d) 784, loc. cit. 797, That the conceded inability of plaintiff to perform labor, which was part of his substantial duties, would not justify, as a matter of law, a verdict for the plaintiff; that plaintiff would not be entitled to recover, notwithstanding he could not perform farm labor by reason of his injuries, if he nevertheless had the ability to substantially perform his occupation by discharging duties other than farm labor."

This conclusion was compelled by the decision of the Supreme Court of Missouri in **Heald v. Aetna Life Insurance Company**, 340 Mo. 1143, 104 S. W. (2d) 379, as noted by the Kansas City Court of Appeals, 114 S. W. (2d), l. c. 172.

The supposed conflict between the ruling of the Circuit Court of Appeals and the Kansas City Court of Appeals does not exist.

II.

The opinion of the Circuit Court of Appeals is in harmony with the decisions of Missouri's highest court, its Supreme Court.

The Petitioner seems to contend in this case that, having established by the testimony that he is unable to do heavy

farm labor, he is totally disabled despite the fact that he is engaged in a lucrative business, earning a livelihood and a profit in addition, by performing duties other than heavy farm labor. This could be true only upon the theory that an insured is totally disabled where he is incapacitated from performing **any** substantial part of his ordinary duties. This is the view taken in the case of **Young v. Travelers Ins. Co.**, 80 Maine 244, l. c. 247, 13 Atl. 896. The principle therein expressed was injected into the opinion in **James v. United States Casualty Co.**, 113 Mo. App. 622. Thereafter it was accepted in **Katz v. Union Central Life Ins. Co.**, 226 Mo. App. 618, 44 S. W. (2d) 250, l. c. 252. The principle was reiterated and recognized in **Buis v. Prudential Ins. Co.**, 229 Mo. App. 190, 77 S. W. (2d) 127.

Finally, however, this whole line of authority was repudiated by the Supreme Court of Missouri in **Heald v. Aetna Life Ins. Co.**, 340 Mo. 1143, 104 S. W. (2d) 379, l. c. 384. There the Supreme Court of Missouri said:

> "In Katz v. Union Central Life Ins. Co., 226 Mo. App. 618, 44 S. W. (2d) 250, 252, the gist of the decision was expressed as follows: 'Applying these general rules of construction' (citing Corpus Juris), the court held, 'it was a question for the jury to decide whether or not plaintiff had become, and still was, incapacitated from performing **any** substantial part of his ordinary duties, thereby presenting a case of total disability, even though he was still able to perform a few minor duties.' (Our emphasis.)
>
> "The case of Buis v. Prudential Ins. Co., 229 Mo. App. 190, 77 S. W. (2d) 127, in so far as pertinent here, was ruled upon the authority of the Katz Case and under identically the same definitive rule as applied therein. So in that respect both of those cases are in the same category. We are of opinion that those cases were correctly decided on the facts, but we think that the governing principle or rule was incorrectly stated. It is not in harmony with the other decisions reviewed

herein, or any other Missouri decision so far as we are advised. That expression of principle is found in Young v. Travelers' Ins. Co., 80 Me. 244, l. c. 247, 13 A. 896, a leading case but not widely followed in other jurisdictions in that respect. Nor did the James Case follow it, as has been seen above, though it cited the same. Moreover, the author of the Bellows opinion, after discussing the Young Case, expressly declined to so interpret it and to follow it. So it is well for the plaintiff, whose counsel have argued in support of that incorrect statement of the law, that his case was not predicated upon it in the instructions given."

These repudiated cases are cited indiscriminately by Judge Thomas in his dissenting opinion.

There is nothing in the opinion of the Circuit Court of Appeals in the case at bar which is in conflict with the ruling of the Supreme Court of Missouri in the **Heald** case, supra. On the other hand, if it should be held that the insured was totally disabled simply because he is found to be unable to perform **one** of his substantial duties (heavy farm labor), that opinion would be in conflict with the ruling of the Supreme Court of Missouri in the **Heald** case. The **Heald** case passes upon the issue involved here and precludes recovery by the Petitioner.

He was actually engaged in the business of farming and the work of farming for profit under circumstances disentitling him to benefits under the provision of the contract that "if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived."

In addition to the provision defining total and permanent disability which entitle the Appellee to disability benefits and waiver of premium, all of the policies in question contain this further provision (Tr. 23):

"Before making any income payment or waiving any premium the Company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, **or if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit,** no further income payments shall be made nor premiums waived." (Emphasis ours.)

In view of the testimony in which he expressly stated that he had, since the injury, continued the operation and management of the Estate Farm in the same manner as before the injury, except that he was unable to do any manual labor himself, Respondent was entitled to discontinue income payments under the provisions hereinabove mentioned.

These provisions of the policies relate not to disability but to conduct. It is a provision separate and apart from the disability provision of the contract. It is to be noted that under the disability provisions, which is found in the first part of the policy (Tr. 22-24), the insured is entitled to income payments upon being disabled as therein defined. These policies contain a further provision relating to the conduct of assured and unconcerned with disability. By this provision it is provided that regardless of his physical ability to do so, if the insured performs any work or follows any occupation or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived. In order to be entitled to any disability benefits under these policies, the Petitioner must not only qualify under the disability provisions of the policies, but also under this provision, and if he does any of the things enumerated, then under the plain, concise and unequivocal wording of the contract he is not entitled

to the benefits provided. It is the position of Respondent that Petitioner by his conduct in the performing of work, which he in his evidence detailed that he was performing, authorized the discontinuance of further income payments under the above provisions of the policies providing that if he perform any work, follow any occupation or engage in any business, no further income payments shall be made.

Respondent submits that this requirement is reasonable and is not in conflict with any part of the policy and therefore should be enforced. Equally stringent provisions have been held valid in disability income policies requiring continuous confinement. **State ex rel. Commonwealth Casualty Co. v. Cox,** 322 Mo. 38, 14 S. W. (2d) 600.

It has further been held that unambiguous language in insurance policies must be given its plain meaning and be enforced as written even when considering restrictive provisions of the policy. **State ex rel. Prudential Life Ins. Co. v. Shain** (Mo. Sup.), 127 S. W. (2d) 675.

In this case we submit that the language is clear to the effect that if the insured actually did any work, engaged in any business or occupation for profit, that he is not entitled to further income payments. His own testimony is equally clear that during the time in question he did actually engage in an occupation or business for profit. It is submitted that Petitioner has brought himself within the above-quoted provision of this contract and relieved the Respondent of the duty to make any further payments.

This question was raised and passed upon by the Kansas City Court of Appeals, **Stoner v. New York Life Insurance Company** (Mo. App.), 90 S. W. (2d) 784, and the Court of Appeals held that the construction given it should be the same as that given the insuring clause, that it is therefore meaningless. There the Kansas City Court of Appeals said (l. c. 793):

"In other words, the insuring clause gives the right to benefits when insured is disabled so as to prevent the doing of certain things. The last clause but negatives his right to benefits when he is not so prevented, but when he is able so to engage and does so engage. They are correlative clauses. Both are to be given the same construction."

It is true that an application for certiorari was denied in this case by the Supreme Court of Missouri. However, denial of the application does not denote affirmance of the opinion. The application was made in order to preserve the objections to this ruling so that it might not become the law of the case. Certiorari, except in exceptional cases, will not lie to the Supreme Court of Missouri until final judgment is entered. Since there was no final judgment, and since no identical case had been passed upon by the Supreme Court, there was ample grounds for the denial of the writ without affirmance of the opinion. Applying the rule of the case of **State ex rel. Prudential Life Ins. Co. v. Shain**, supra, the conclusion must be reached that Judge Reynolds of the Court of Appeals did violence to this contract by so construing it, as he did, to the contract under review in the **Prudential Case.**

III.

The opinion of the Circuit Court of Appeals follows the law of Missouri as declared by the St. Louis Court of Appeals and the Springfield Court of Appeals, courts of equal rank with the Kansas City Court of Appeals.

Upon the specific facts found by the trial court, a proper application of the law of Missouri as declared by the St. Louis and Springfield Courts of Appeals requires a finding in favor of the Respondent. Assuming that there is no decision of the Supreme Court of Missouri upon the matter decided by the Circuit Court of Appeals, we submit

that the holdings of two Courts of Appeals of Missouri are contrary to the Petitioner's construction of the Missouri law. The Springfield Court of Appeals and the St. Louis Court of Appeals have declared the law of Missouri to be in accord with the judgment of the Circuit Court of Appeals. If two of the three Courts of Appeals of the state support the conclusion of the Circuit Court of Appeals, there can certainly be no federal rule requiring that the Circuit Court of Appeals follow the third Missouri Court of Appeals.

SPRINGFIELD COURT OF APPEALS.

Jones v. Metropolitan Life Insurance Company (1939) (Mo. App.), 130 S. W. (2d) 967.

This was an action upon the disability clause of a group insurance policy. The policy provided for disability benefits upon proof that the insured "has become totally and permanently disabled as a result of bodily injury or disease so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit."

The insured secured a verdict and judgment below. On appeal the insurer questioned the sufficiency of evidence to make a case for the jury. The Springfield Court of Appeals reversed the judgment outright, holding there was not sufficient evidence to make a case for the jury. The holding was based upon the ground that the uncontradicted evidence was that plaintiff did work whether he felt like it or not for two years preceding the trial. This was said to be "proof absolute that he was not physically and permanently incapacitated to work."

In so holding the Springfield Court of Appeals said:

> "The evidence shows that the plaintiff worked at various employments from the time he quit the employment for the Lead Company up to the time of the trial of this case in the circuit court. He testified that

he worked several months for the W. P. A. There was a record of the time he put in work for the W. P. A., introduced in evidence, showing the dates he worked, the number of hours, and the amount he received for such work. This uncontradicted record shows that he commenced work there on December 11, 1935, and continued to work every week up to April 7, 1938, just eight days before the trial in this case was had. This record shows that he worked from 48 hours to 64 hours each two weeks throughout the time from December 11, 1935, to April 11, 1938, and that he received wages for such work ranging from 36 cents per hour to 48 cents per hour, and this without any testimony that he was unable to do the work. **There was some evidence that he was not strong physically, but there was no evidence of any kind that he was totally disabled, either before or after he quit work for the Lead Company. In fact, the uncontradicted evidence all shows that he did work, whether he felt like it or not, and the very fact that he did work throughout the entire time, and that he worked regularly for the entire two years immediately preceding the trial, is proof absolute that he was not physically and permanently incapacitated to work.** And under the expressed terms of the policy incapacity to work, or total and permanent disability, must be shown by competent evidence before the insurance company is liable. Smith v. Metropolitan Life Ins. Co., Mo. App., 108 S. W (2d) 995." (Emphasis ours.)

Under the ruling of the Springfield Court of Appeals, the insured, Stoner, in the case at bar was shown by "proof absolute" not to be totally disabled.

ST. LOUIS COURT OF APPEALS.

Smith v. Metropolitan Life Insurance Company (1937) (Mo. App.), 108 S. W. (2d) 995.

This was an action to recover total disability benefits upon a policy providing therefor upon proof that the insured "has become totally and permanently disabled as a result of bodily injury or disease so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit."

The plaintiff secured a verdict and judgment of a jury. On appeal, the sufficiency of evidence to make a case was questioned. The Court of Appeals reversed the judgment of the trial court outright, holding that the evidence did not make a submissible case of total disability. This holding was based upon the ground that the evidence showed that the insured worked at his usual employment during the period for which disability was sought. In so holding, the Court of Appeals said:

> "Ignoring defendant's evidence and taking into consideration only the evidence adduced on behalf of plaintiff as well as plaintiff's own testimony, it clearly appears that plaintiff worked at his usual employment in the usual and customary way not only prior to March 31, 1932, but also during April, May, and the early part of June, 1932, after the policy sued on was canceled. It appears without dispute that he was not only able to do this but that he worked overtime both before and after the date of the cancellation of the policy sued on.
>
> "The cases cited above show that the appellate courts of this state have given to policies of insurance containing disability clauses similar to the one involved herein a broad and liberal construction and have affirmed judgments in favor of insured employees,

notwithstanding evidence showing that the employee did some work during the periods covered by such policies. **An examination of all such cases, however, discloses that in every instance where a judgment for a claimant was affirmed there was evidence in the case from which it could be reasonably inferred that the employee was able to perform his work only by virtue of the assistance of others or by the exercise of extreme, extraordinary, and painful efforts involving grave risks of health and life. We have no such testimony in this case.** The testimony of the doctors concerning the condition which they found plaintiff to be in during June and July, 1932, after the policy herein had been canceled and after the severe attack of typhoid fever which plaintiff suffered at that time, does not relate to plaintiff's condition on and prior to March 31, 1932, while the policy herein was in force and effect. It will be noted that plaintiff's own family physician made a physical examination of plaintiff on June 6, 1932, 'which disclosed typhoid fever, nothing else.' The doctor testified that he went to see plaintiff regularly from the 6th of June to the 25th of July, 1932, and stated: 'I don't remember what was wrong with him prior to that time.' He stated that he did not examine plaintiff's muscles at that time and said further: 'I have no record of any severe illness prior to this typhoid.'" (Emphasis ours.)

In the motion for rehearing, counsel for the insured asserted that the opinion represented a departure from the liberal rule announced and applied previously by the courts of Missouri. The Court of Appeals denied that there had been a departure from the rule of liberal construction. On motion for rehearing the Court said (l. c. 1000):

"There has been no departure in the opinion by this court from the rule of liberal construction. This court is in hearty accord with the rule as evidenced by its

many decisions heretofore referred to, but, as stated in the original opinion herein, we are not permitted to indulge in conjecture and guess to apply it in a case where the evidence does not show that the claimant was totally and permanently disabled during the period covered by the policy sued on. The motion for rehearing is therefore overruled."

Eden v. Metropolitan Life Insurance Company (1940) (Mo. App.), 138 S. W. (2d) 745.

This is an action upon the total and permanent disability clause of a group insurance policy. The disability clause provided for benefits upon proof that the insured "had become totally and permanently disabled as a result of bodily injury or disease so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit." The plaintiff recovered and, on appeal, defendant questioned the sufficiency of the plaintiff's evidence to make a submissible case.

The St. Louis Court of Appeals reversed the judgment of the trial court, holding the evidence insufficient to make a case of total disability. It held that the evidence showed that the insured was able to and did work with such proficiency as to be able to earn more than a basic rate of pay of his calling. In so holding the St. Louis Court of Appeals plainly announced the rule which would defeat recovery in this case (l. c. 748):

"We appreciate that for an insured to be totally disabled within the meaning of a disability clause such as the one upon which this action is based, he need not be absolutely helpless, but that it suffices if he shows the existence of an infirmity which renders him unable to perform, in the usual and customary way, substantially all of the material acts which are necessary to the prosecution, either of his own particular occupa-

tion, business or calling, or of any occupation, business or calling which his age, training, experience, education and physical condition would fit him for except for his disabling infirmity. Heald v. Aetna Life Insurance Company of Hartford, Conn., 340 Mo. 1143, 104 S. W. (2d) 379; Moss v. Metropolitan Life Insurance Co., 230 Mo. App. 70, 84 S. W. (2d) 395; Wright v. Metropolitan Life Insurance Co. (Mo. App.), 115 S. W. (2d) 102; Rogers v. Metropolitan Life Insurance Co. (Mo. App.), 122 S. W. (2d) 5.

"The trouble is that in this case, not only did plaintiff's own evidence show that during his employment by the lead company he was physically able to perform, in the usual and customary way, all the material acts of the job assigned to him, but that, indeed, he was so proficient at his work, and so able to do more than the minimum of work called for by the basic rate of pay, that he regularly earned substantial bonuses for himself, and likewise made it possible for regular bonuses to be earned by those of his fellow employees who hauled away the cars he filled.

"This is not the type of case we have so frequently had before us, where it was necessary that the insured employee be customarily aided in his work by his fellow employees, or where he was able to continue on the job only by supreme, extraordinary and painful effort, at the risk of endangering his life and health. On the contrary, plaintiff was paid the bonuses for extra work up to the very time of his injury in the explosion, and then failed to come back to the mines when, as shown by certain of his own evidence, he 'was released by the doctor to return to work on March 14, 1931,' after a layoff of only seventeen days. In other words, the injury to his eyes, however painful, was not totally disabling in any proper sense; and so little did it evidently affect his capacity for work that Dr. Vitale, who was plaintiff's only medical witness, made no mention of any such disability in the course of his testimony respecting the findings he had made.

"* * * We think the very most that could be said of any of his evidence would be that it showed the existence, during such period, of a partial disability in the sense of an impairment in some degree of the normal function of certain of the organs of his body, which may, on occasions, have caused him to lose some little time from his work; but to say that at that time he was totally and permanently disabled, even within the liberal construction to be given the disability clause of the policy, would be to go in the very face of his own evidence, which was directly to the contrary of any such conclusion.

"Under the facts of the case, defendant should have had its requested peremptory instruction at the close of all the evidence. Smith v. Metropolitan Life Insurance Co. (Mo. App.), 108 S. W. (2d) 995; Jones v. Metropolitan Life Insurance Co. (Mo. App.), 130 S. W. (2d) 967.

"It follows that the judgment rendered by the circuit court should be reversed and the Commissioner so recommends."

Respondent submits that the opinion of the Kansas City Court of Appeals in the last appeal of a companion case, 232 Mo. App. 1048, 114 S. W. (2d) 167, is not in conflict with the rule announced by the Springfield Court of Appeals and the St. Louis Court of Appeals. But if it is conceived to be in conflict with that rule, then the Circuit Court of Appeals was at perfect liberty to use its best judgment to determine which view would ultimately prevail.

We submit that this judgment was wisely exercised. And we consider it of no moment that the principal opinion of Judge Dewey expressly stated that none of the opinions of the Missouri Courts of Appeals were binding upon the Circuit Courts of Appeals.

IV.

The Circuit Court of Appeals was not bound to follow the opinions of the Kansas City Court of Appeals in the companion cases. The Kansas City Court of Appeals is not a court of last resort in any case. It is not a court of general territorial jurisdiction in Missouri. Its territorial jurisdiction is limited to one of three districts. Its judgments are of no higher authority than those of the Springfield Court of Appeals and the St. Louis Court of Appeals, co-ordinate courts exercising jurisdiction in different territories. All final judgments of any of the courts of appeals are reviewable by the Supreme Court of Missouri on certificate or by certiorari. Under the doctrine of the Erie case, the Federal Courts are not required to follow decisions of such a court.

We do not believe that the result reached by the Circuit Court of Appeals in the judgment under review is in conflict with the law as declared by the Kansas City Court of Appeals in the companion cases. Nevertheless, against the event that the court should so decide, we submit that the federal courts under the doctrine of the **Erie** case are not required to follow the opinions of the Kansas City Court of Appeals as declaratory of the state law. This is true especially where there are conflicting decisions from either of the courts of co-ordinate rank, namely, the Springfield Court of Appeals and the St. Louis Court of Appeals.

Whether any particular decisions of any particular intermediate appellate court of the state must be followed by the federal courts must depend upon several circumstances.

The first circumstance is the extent of jurisdiction of the intermediate appellate court involved. Any solution of the

question must take into consideration the territorial jurisdiction of the intermediate court.

The second circumstance to be considered is whether, under the organic law of the state creating the court in question, the intermediate appellate court is a court of last resort with the right to finally determine the matter involved.

The third circumstance is the state of the decisions of other appellate courts of the state, both co-ordinate and superior. Certainly if a conflict exists between intermediate appellate courts, the federal court must determine for itself which decision represents the law of the state. And if the opinion of the intermediate appellate court is in conflict with the decisions of the court of last resort, the intermediate appellate court should not be followed.

1. The place of the Kansas City Court of Appeals in the Missouri judicial system.

The Missouri judicial system (with immaterial exceptions) consists of the circuit courts, courts of original jurisdiction, the three intermediate appellate courts, of which the Kansas City Court of Appeals is one, and the Supreme Court of Missouri.

This system is provided for by the Constitution of 1875 and Amendments thereto. **Circuit Courts**, Article VI, Secs. 22 to 30, inclusive; **Courts of Appeals**, Article VI, Secs. 12 to 17, inclusive; Article VI, Amendment of 1884, Secs. 1 to 11, inclusive; **Supreme Court**, Article VI, Secs. 2 to 11, inclusive; Article VI, Amendment of 1884, Secs. 6 to 8, inclusive; Article VI, Amendment of 1890, Secs. 1 to 5, inclusive.

The Constitution of 1875 provided for a Supreme Court (Article VI, Secs. 1 to 11, inclusive) and "an appellate court to be known as the 'St. Louis Court of Appeals.'" (Article VI, Sec. 12.)

The jurisdiction of the St. Louis Court of Appeals was coextensive of the City of St. Louis and the four neighboring counties of St. Louis, St. Charles, Lincoln and Warren. In certain cases only did the appeal or writ of error lie from the St. Louis Court of Appeals to the Supreme Court (Article VI, Sec. 12). However, in the Constitution of 1875 the Supreme Court was given "general superintending control over all inferior courts." And in this connection was given power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs (Article VI, Sec. 3). In the Amendment of 1884 to Article VI the jurisdiction of the St. Louis Court of Appeals was extended to include fifty-five more counties (Sec. 1). In the same Amendment the Kansas City Court of Appeals was created and its jurisdiction made coextensive with all the counties in Missouri except those within the jurisdiction of the St. Louis Court of Appeals (Sec. 2). In the same Amendment the Legislature of Missouri was given the power by law to create an additional court of appeals. The Springfield Court of Appeals was established by legislative act in 1909 and its territorial jurisdiction defined (Sec. 1907, R. S. Mo. 1929). By appropriate legislative act, the territorial jurisdiction of the St. Louis and Kansas City Courts of Appeals were reduced to permit the establishment of the Springfield Court of Appeals (Secs. 1889, 1897, R. S. Mo. 1929). These three Courts of Appeals now exist.

In the amendment to Article VI of 1884 jurisdiction in matters appealable to the Supreme Court was denied to the courts of appeals (Sec. 5). And the Supreme Court was expressly given "superintending control of the courts of appeals by mandamus, prohibition and certiorari" (Sec. 8), and it was provided that the last previous ruling of the Supreme Court on any question should in all cases be controlling authority in the courts of appeals (Sec. 6).

The judges of the courts of appeals were charged with the duty of certifying to the Supreme Court any case in which its decision is deemed by any one of the judges to be contrary to any previous decision of any one of the courts of appeals or of the Supreme Court (Sec. 6).

The Supreme Court is the court of last resort. It exercises "superintending control" over the judgments of the courts of appeals by mandamus, prohibition and certiorari. **Mandamus**, State ex rel. City of Stanberry v. Smith, 172 Mo. 618; **Prohibition**, M. K. & T. Ry. Co. v. Smith, 154 Mo. 300; **Certiorari**, State ex rel. Gilman v. Robertson, 264 Mo. 661. It hears certified cases as if originally appealed to it. Berry v. Equitable Fire and Marine Ins. Co., 317 Mo. 1119, 298 S. W. 63.

Only where the judgment has become final will the writ of certiorari lie from a superior to an inferior court. **State ex rel. Duraflor Products Co. v. Pearcy**, 325 Mo. 335, 29 S. W. (2d) 83. Undoubtedly, this is the reason that certiorari was denied when sought by the respondent to review the opinion of the Kansas City Court of Appeals in **Stoner v. New York Life Insurance Company** (Mo. App.), 90 S. W. (2d) 784. The denial of the petition for certiorari in that case is not an approval of the judgment sought to be reviewed. In the Supreme Court of Missouri, as in this court, denial of a petition for certiorari does not denote affirmance. **State ex rel. Duraflor Products Company v. Pearcy**, 325 Mo. 335, 29 S. W. (2d) 83.

The application to review the opinion of the Kansas City Court of Appeals was premature, because no final judgment had been entered. The Court of Appeals had only remanded the cause for a new trial. **State ex rel. Duraflor Products Co. v. Pearcy**, supra. What the Supreme Court of Missouri would say about the ruling of the Kansas City Court of Appeals in the first **Stoner** case, when and if the soundness of that decision is ever prop-

erly presented for determination, is a matter of conjecture. In any event, the opinions of the Kansas City Court of Appeals do not constitute rulings by the highest court of Missouri nor do they constitute authoritative determinations of the law of Missouri per se. Opinions of the Kansas City Court of Appeals are not binding upon the federal courts for these reasons:

(1) The Kansas City Court of Appeals is a court of limited territorial jurisdiction within the state. Its jurisdiction is less than statewide.

(2) The Kansas City Court of Appeals is not a court of last resort. Its decisions are reviewable by the Supreme Court of Missouri on certificate and by certiorari, mandamus and prohibition.

(3) A decision of the Kansas City Court of Appeals may conflict with the decisions of a co-ordinate court of appeals serving a different territorial jurisdiction. If the opinion in the first **Stoner** case (90 S. W. [2d] 784) decided by the Kansas City Court of Appeals is subject to the construction placed upon it by Petitioners, it is certainly in conflict with the decisions of both the Springfield Court of Appeals and the St. Louis Court of Appeals. (See Point III hereof.)

(4) The Kansas City Court of Appeals is especially enjoined by the Constitution to follow the decisions of the Supreme Court of Missouri. Any judgment which it renders in conflict with the decisions of the Supreme Court of Missouri is held to be wholly in excess of its jurisdiction, void and subject to being quashed on petition for certiorari.

For these reasons we believe that an examination of the structure of the Missouri judicial system and the place of the Kansas City Court of Appeals therein leads to the con-

clusion that its decisions have no binding effect upon the federal courts as declarations of the law of the state. Of course, they should be given the persuasive effect to which their reasoning entitles them.

2. Petitioner's theory would deprive Respondent of its ultimate right to have the opinions of the Court of Appeals reviewed in the light of the decisions of the Supreme Court of Missouri.

As we understand it, liberally construed, the ultimate aim of the Court in adopting the rule of the **Erie** case was to secure in the Federal Courts, in cases passed on involving diversity of citizenship, application of the same law that would be applied in the State Court if the causes were tried there. Therefore, it is of importance that the Federal Courts refrain from adopting as **final** the decisions of any intermediate state court which is not considered final by the State Courts. For instance, in the case at bar, if **final** judgment should ever be rendered against the insurer in one of the companion cases by any of the Missouri Courts of Appeals, a right to test the correctness of that final judgment on application for certiorari to the Supreme Court of Missouri exists. (See **State ex rel. Prudential Life Insurance Company v. Shain**, 344 Mo. 623, 127 S. W. [2d] 309.) **So, in evaluating the weight which will be given to an opinion of the Missouri Court of Appeals, the Federal Court must consider that opinion in the light of the decisions of the Supreme Court of Missouri and the probable outcome of a petition for writ of certiorari calling into question a final judgment in the case.** To do otherwise would be to hold the parties bound in the Federal Court by a decision which might not bind them in the State Court.

There is no merit in the contention that the Supreme Court of Missouri reviewed the ruling of the Kansas City Court of Appeals in **Stoner v. New York Life Insurance**

Company, 90 S. W. (2d) 784, and denied the contentions of the Respondent.

The reason that there is no merit in this contention is because the statement is incorrect. (See Point V hereof.)

V.

There is no ruling by the Supreme Court of Missouri affirming the judgment of the Kansas City Court of Appeals in 90 S. W. (2d) 784.

Petitioner urges in point (d) (p. 10) of "Reasons Relied Upon for the Allowance of the Writ" that the Supreme Court of Missouri has held that this and like policies are ambiguous and subject to judicial construction, citing the cases of **State ex rel. New York Life Ins. Co. v. Shain; State ex rel. Metropolitan Life Ins. Co. v. Allen**, 337 Mo. 525, 85 S. W. (2d) 469; **State ex rel. Metropolitan Life Ins. Co. v. Hostetter**, 338 Mo. 589, 92 S. W. (2d) 122; **Bellows v. Travelers Ins. Co.** (Mo.), 203 S. W. 978.

It is urged that the Supreme Court of Missouri reviewed the ruling of the Kansas City Court of Appeals in **Stoner v. New York Life Ins. Co.**, 90 S. W. (2d) 784, and affirmed the holding of the Kansas City Court of Appeals that the policies here in question were ambiguous and subject to construction (Petitioner's Brief, page 29).

The Supreme Court of Missouri did not review the ruling of the Kansas City Court of Appeals in **Stoner v. New York Life Ins. Co.**, 90 S. W. (2d) 784. The respondent in this cause requested the Supreme Court of Missouri to review that decision by filing a petition for writ of certiorari in the Supreme Court of Missouri. The application for the writ was denied without comment, opinion or ruling on any issue involved in the case. There are many reasons why the Supreme Court of Missouri in

its discretion might have refused the writ. The application was premature, because no final judgment had been rendered, but the cause had simply been remanded by the Court of Appeals. **State ex rel. Duraflor Products Co. v. Pearcy**, 325 Mo. 335, 29 S. W. (2d) 83, l. c. 89.

Regardless of the reason prompting the Supreme Court of Missouri to deny the petition for certiorari and thereby to refuse to review the ruling of the Kansas City Court of Appeals, it is well settled that denial by the Supreme Court of Missouri of a petition for a writ of certiorari to review the opinion of an inferior court is not an affirmance of the judgment of the inferior court in any respect. **State ex rel. Duraflor Products Company v. Pearcy**, 325 Mo. 335, 29 S. W. (2d) 83. In that case, supra, the Supreme Court of Missouri said on this subject:

> "But above and beyond the objections just mentioned is the fact that a writ of certiorari is not a writ of right (as regards private suitors), and that the issuance thereof rests in a sound judicial discretion. State ex rel. v. Dobson, 135 Mo. 1, 19, 36 S. W. 238, 243; State ex rel. v. Terte, supra, 320 Mo., loc. cit. 472, 8 S. W. (2d), loc. cit. 19; State ex rel. v. Pfeffle, 220 Mo. App. 676, 682, 293 S. W. 512, 515. A refusal of the writ in the exercise of that discretion cannot be taken as an adjudication on the right of the party to have it or on the merits of the controversy, such as makes these questions res judicata. 11 C. J., Sec. 385, p. 213; People ex rel. v. City of Kingston, 101 N. Y. 82, 91, 4 N. E. 348" [29 S. W. (2d), l. c. 87].

Therefore the assertion by Petitioner that the Supreme Court of Missouri "ruled that the Kansas City Court of Appeals was right" is erroneous and a misconception of the legal effect of the denial of a petition for writ of certiorari.

VI.

Petitioner was not totally and permanently disabled during the period involved.

Upon waiver of a jury, it devolved upon the District Court to determine all issues of fact in accordance with the law and the preponderance or greater weight of the evidence. The question of total disability was such an issue. By circuitous reasoning, distinguished by novel legal conceptions and questionable play on words unrelated to any legal authority (and citing none), the District Court arrived at the conclusion that Respondent had not even made a submissible or prima facie case under the law (Tr. 99). There was, however, under this record, no occasion for the practice of hair-splitting logic. In attending to what were conceived to be the technical niceties of the case, the District Court overlooked or avoided the obvious.

The evidence and Petitioner's own testimony showed that Petitioner was able to and actually was engaged in the business of a grain and stock farmer for profit; that he earned his livelihood and made a profit in addition, as a result of his efforts in operating a rented farm under a business-like arrangement with the landlord.

Under these circumstances it was the duty of the District Court to find for Respondent and enter a declaratory judgment of nonliability for the period involved.

The Kansas City Court of Appeals, in rendering its opinion upon these very contracts and this same evidence, held that total disability was not proved as a matter of law, saying:

> **"We further held, 90 S. W. (2d) 784, loc. cit. 797, that the conceded inability of plaintiff to perform labor, which was part of his substantial duties, would**

not justify, as a matter of law, a verdict for the plaintiff; that plaintiff would not be entitled to recover, notwithstanding he could not perform farm labor by reason of his injuries, if he nevertheless had the ability to substantially perform his occupation by discharging duties other than farm labor. We expressed this thought in somewhat different language. See, 90 S. W. (2d) 784, loc. cit. 796, 797, where we said, 'Plaintiff is not to be denied benefits by reason of the provisions of said clause by reason of his conduct in undertaking to operate and manage his said farms and to direct farming operations thereon unless in such undertaking he is able to perform in a substantial way all of the material duties of his occupation as a farmer engaged in the actual operations which he is undertaking to perform.'

"Plaintiff, by his instruction No. 1, has failed to follow our ruling in the former appeal. The instruction fails to submit to the jury plaintiff's duties as a whole but attempts to separate those duties as between those involving farm labor and those involving the remainder of his occupation." (Emphasis ours.) Stoner v. New York Life Insurance Company (Mo. App.), 114 S. W. (2d) 167, l. c. 171-172.

This conclusion was compelled by the decision of the Supreme Court of Missouri in **Heald v. Aetna Life Insurance Company,** 340 Mo. 1143, 104 S. W. (2d) 379, as noted by the opinion of the Court of Appeals, at page 172.

Therefore, we submit that the evidence clearly preponderates in favor of a finding of the absence of total disability.

For the period covered by this suit, it was admitted by Petitioner that he has operated the leased Estate Farm in a manner such as to earn a livelihood for himself and the landlord and a profit in addition, doing everything that he did before his injury except manual labor. And it is admitted by Petitioner that during this time his

efforts have earned him a livelihood and a profit. In addition he has personally conducted the operation of the farm except for the manual labor. And it is admitted by Petitioner that the principal business of the farm is buying, feeding and selling live stock, which he does. And it is admitted by Petitioner that he has less assistance in the operation of the farm than before; that the introduction of modern farm machinery has obviated the necessity for his physical labor, and in addition has permitted him to release one regular employee. (If this is total disability, we wonder what would be partial disability within the meaning of a policy insuring against partial disability.)

Under the terms of the contract of insurance (Tr. 21-22), the insured is not entitled to disability benefits or waiver of premiums until he "is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit * * *."

The trial court held that Petitioner was not insured against disability from following the occupation or business that he was engaged in at the time of the issuance of the policy, but that the word "any" must be given its reasonable and obvious meaning (Tr. 96). The court further held that the three essential elements constituting total disability are alternatives (Tr. 96), and if it is proved that the insured is not wholly prevented "from doing any work" or that he is not wholly prevented "from following any occupation" or that he is not wholly prevented "from engaging in business for remuneration or profit" then Respondent is under no liability (Tr. 96-97).

In a consideration of the question of whether or not Petitioner is totally disabled within the meaning of the policy it would seem unnecessary to attempt to distinguish between the phrases "from performing any work," "from following any occupation," and "from engaging in any

business." The trial court held and, we think properly, that the last phrase is the broadest. It must be admitted that if the insured is able to engage in any business for remuneration or profit he is not entitled to the benefits claimed under the policy. For the purpose of this review, therefore, it is sufficient to consider whether or not the activities of Petitioner as described in the record constitute "engaging in business for remuneration or profit."

It becomes necessary to first determine what is meant by the words "business" or "engaging in business."

1. **"Business Defined."**

"Business," as defined by the trial court is "any one of those vocations of livelihood whereby men have been accustomed to earn livelihood for themselves and their families." This is in accordance with the approved definition of the word. **Webster's New International Dictionary** defines business as "that which busies, or engages time, attention or labor as a principal serious concern or interest —any particular occupation or employment habitually engaged in, especially for livelihood or gain."

The following definition of the word is found in **12 C. J. S.**, page 765:

> "It has been said that while there are few words more current in our speech than the word 'business,' and few that include a greater variety of subjects, yet there is none which, in popular speech, has greater or more marked singleness in denotement, and that when one speaks of 'business,' the mind naturally contemplates a commercial or industrial establishment or enterprise.
>
> "In this narrower sense, or commercial use, it has been held that the word applies only to that in which one engages for the purpose of livelihood, profit, or the like, and hence is applicable to any particular

employment, occupation, or profession followed as a means of livelihood; that, as so commonly used, it has reference to, or implies, a regular and legal employment pursued for profit, and with a view to livelihood or some gain, it being said that these objects are necessarily implied when one's business is spoken of; also, that it includes all manner of occupations or means by which persons earn a livelihood, and every employment, occupation, profession, or trade; and in this sense the word has been defined, in general, as meaning calling, employment, profession, trade, or vocation."

In the case of **Plant v. Walsh**, 280 Fed. 722, it was held that a man having other sources of income who was operating a farm through an organization of experts and under the supervision of a comptroller, but who gave a considerable part of his personal time to bringing about efficiency and putting the farm on a paying basis, was engaged in the business of farming so that losses from his farming operations could be considered as business losses.

In **Washburn v. Commissioner of Internal Revenue**, 51 Fed. (2d) 949, it was held that a retired lawyer who was actively engaged in the management and operation of various corporations and enterprises in which he had invested his money was engaged in business.

In **Foss v. Commissioner of Internal Revenue**, 75 Fed. (2d) 326, it was also held that a man actively engaged in the management of various companies in which his funds were invested was engaged in business so that he might take deductions from attorney fees paid his personal counsel in litigation involving his rights in the operation of one of his various enterprises.

In the case of **Collins v. Truman** (Mo. App.), 14 S. W. (2d) 526, the court held that the use of a room as an

office for a Justice of the Peace was prohibited by a clause in a lease forbidding the use of the room for any business other than a restaurant, it being held by the court that the word "business" was broad enough to include the occupation of Justice of the Peace.

In **Pitts v. Maupin**, 230 Mo. App. 221, 88 S. W. (2d) 384, the court held that a man may have more than one business and in that case held Maupin had two businesses, one a seed business in the town of King City and the other a farming business in Nodaway County. While the opinion is not clear on the question, it appears therefrom that Maupin did not devote labor to the operation of his farm but devoted most of his time to the seed business in King City. Yet, the Missouri Court held that the operation of the farm constituted a business.

Under the foregoing definitions it is seen that the performance of manual labor, incident to the accomplishment of the business, is not necessary in order for one to be engaged in business. In ordinary usage "business" is considered as a combination of personal effort and capital. **Plant v. Walsh**, supra; **Washburn v. Commissioner of Internal Revenue**, supra, and **Foss v. Commissioner of Internal Revenue**, supra.

2. The activities of Petitioner as disclosed by the record show him engaged in business for remuneration or profit.

Petitioner's own evidence discloses that he is engaged in business for remuneration or profit. According to his testimony Petitioner lived on a farm of 200 acres referred to as the Estate Farm. His mother owned the life estate in this farm and Petitioner rented the farm from her under an agreement whereby he paid to her a certain part of the profits after taxes and expenses were paid. In addition he owned and operated in connection therewith a farm of 105

acres. Before and after the accident these farms were operated by Petitioner as grain and stock farms. He raised grain and stock and in addition to the stock raised by him purchased live stock for the purpose of fattening and resale. Prior to his accident, in the operation of his business he did a certain amount of manual labor incident to the planting and harvesting of his crops and the feeding of live stock. After the accident and during the period of time, in question in this suit, he operated the farms in exactly the same manner with the exception that he employed a man to do the manual labor which prior to his accident was done by him personally. No change was made in the agreement for the operation of the farm with his mother. After the accident he still devoted his entire time to the operation of these farms and to the buying and selling of live stock exactly as he had done prior to his injury, and from these operations made a livelihood and a profit to turn over to his mother. There is no testimony that he was unable to perform any of the duties which he did perform during the period in controversy, although there is testimony that he was unable during this period to perform the manual labor in connection with the operation of the farm which he had performed prior to his accident.

It is the position of Respondent that under these circumstances Petitioner was engaged in business during the period in controversy within the meaning of the use of that word in the provisions of the contract of insurance. He was engaged in activities which have been defined by lexicographers and courts as constituting a business.

The Federal Courts in passing upon the exemption in the fourth section of the bankruptcy act have had occasion to define what constitutes the occupation or business of farming. The courts have uniformly held that it is not

necessary for one to be engaged in the manual labor incident to farming in order to be engaged in the occupation or business of farming and, therefore, come within the exemption of the statute. In the case of **First National Bank & Trust Company of Bridgeport, Conn., v. Beach**, 301 U. S. 435, 441, 57 S. Ct. 801, 81 L. Ed. 1206, 86 Fed. 88, the Circuit Court of Appeals of the Second Circuit in passing upon what constitutes a farmer said (l. c. 89):

> "We reject the first alternative; a man is no less a farmer because he hires laborers, either regularly or sporadically; he is 'personally' engaged in farming, though, being in possession, he rides his acres and superintends the manual labors of others." (Certiorari was granted and this opinion was affirmed by the Supreme Court.)

In **Florida National Bank et al. v. Evans**, 28 Fed. (2d) 67, the court held that the provision exempting farmers from involuntary bankruptcy included persons operating farms through overseers and wage hands. The Court said (l. c. 72):

> "It is not necessary in this case to determine whether 'farming' and 'tillage of the soil' are synonymous, or whether the latter applies to any natural person engaged chiefly in doing manual labor on a farm in any capacity, whether as owner, overseer, tenant, cropper, or wage hand. Evans was not engaged chiefly or otherwise in that kind of work. Whatever may be the meaning of 'tillage of the soil,' 'farming' includes more than manual farm labor, and the provision in the Bankruptcy Act exempting natural persons engaged chiefly in farming is not limited to persons engaged in such work. Neither is it limited to small farmers or to large farmers. A man may own or rent a small farm and do the work himself, or he may own or rent thousands of acres and operate through overseers and wage hands, without doing any manual labor

himself, and in either case he is engaged in farming. So far as the character of the work is concerned, one's farming activity may be physical or mental or financial, just so long as it is work done in operating a farm. It is all farm work."

In **Wulbern v. Drake**, 120 Fed. 493, the alleged bankrupt managed and controlled plantations containing over 1,100 acres, the greater part of which he owned, the title of the remainder being in his children. Nearly all the land was cultivated by hired labor and the remainder by tenants. He resided on the land and devoted the principal part of his time to the carrying on of its cultivation, upon which he relied for his principal source of income.

It was urged that the land was not cultivated by Drake personally, and that since manual labor was performed by hirelings or tenants he could not be regarded as a farmer. In holding that Drake was engaged in the occupation of farming the court said (l. c. 495):

> "We cannot agree with this view as to the meaning of the term 'farmer,' or 'one engaged in the tillage of the soil,' as the same should be construed in compliance with the spirit and language of the statute; but, on the other hand, we coincide with the conclusion of the District Judge when he declares, 'within the purview of this statute it is understood to mean the business of cultivating land or employing it for purposes of husbandry.'"

Under the foregoing decisions it must be held that under the bankruptcy statute Petitioner would surely be held to be engaged principally in the business of farming and come within the exemption.

If Petitioner had been operating his farms prior to the accident exactly as he is now, that is, by devoting his time to supervision and management and employing persons

to do the manual labor, it surely would be said that he was engaged in the occupation or business of farming. Likewise, we take it, no one would be bold enough to insist that he would now be entitled to disability benefits under this policy, because he had been incapacitated from doing manual labor on these farms. If the operation of his farms in the present manner could ever be considered a business, then it must be considered a business at this time regardless of the fact that at another time he may have operated his business upon a different basis.

His disability has not incapacitated him from engaging in business for remuneration or profit but has only incapacitated him from engaging therein in a certain manner.

It is a recognized fact that two men may be engaged in what is known as "the same business" and yet their activities and duties in the carrying on of their business may be entirely different. For instance, A may be engaged in a clothing business operating a small shop and his duties will include everything from waiting on the customers to doing the janitor work. B, also engaged in the clothing business, as the executive of a large firm, may have duties which only in a small measure or perhaps in no way coincide with the duties of A. Yet, no one will say that both are not engaged in the clothing business. If A was incapacitated to longer carry on his small shop and had the means and ability to acquire a larger organization which he might operate and control through emplyees, then could it be said that he is not then engaged in the clothing business? Unquestionably he would be engaged in business for remuneration or profit in the second instance just the same as in the first. He would simply have changed his methods of operating his business.

The trial court held that Petitioner was not insured against the inability to engage in the occupation followed

at the time of the injury, but that he was only insured against the inability to engage in **any** occupation. The record discloses Petitioner has the means and ability to engage in the business of farming, as the word "business" has been defined by the courts, and is earning a livelihood and profit therefrom. He is engaging in this business now without the performance of manual labor, which, the record discloses, is unnecessary for him to perform in order to make a livelihood from his business. To hold that he is unable to engage in the business of farming because he cannot perform the manual labor he originally engaged in is to hold in definite conflict with lexicographers and courts upon what constitutes a business. The holding is particularly in conflict with the above cases which hold that a party may engage in the business of farming without performing any manual labor incident thereto.

3. **The Petitioner and not his money is actually engaged in business.**

The trial court took the position that since the business that insured is now engaged in requires the use of capital, and the business of farming, if one has no capital, requires the performance of manual labor, that, therefore, the insured is unable to engage in the business of farming. The court said (Tr. 98):

> "What 'business for remuneration or profit' has it been proved this defendant, assuming he is without capital (and that assumption must be made) can engage in? Certainly the assumption that the defendant is without capital must be made. It is the insured (not the insured's money) that must be able to engage in business."

We submit that the trial court erred in this holding and in ruling that under the terms of the policy the insurer is liable unless the insured is able to engage in some business without the benefit of any capital.

The fact that the operation of his business as now conducted requires capital renders him none the less able to engage in the business, since he has the required capital. Business in its modern, everyday use implies the use of capital. Business, as the term is generally used, is distinguished from work or labor in that one engaged in labor is generally considered to be using only his own physical energy, while one engaged in business is generally considered as using capital either in connection with his own physical efforts or the labor of others. A man is engaged in business when he devotes his time to the use and exercise of his capital for the purpose of enhancing the value thereof, or realizing a greater return therefrom than otherwise would be produced.

It is Petitioner himself, and not his money, which is engaged in this business of farming. The farm is rented, and the expenses of operation paid out of the farm income. Without Petitioner there could be no buying and selling of live stock; it is due to Petitioner's energy and skill that the farms are bringing the returns they are; it is Petitioner who controls and operates the entire business and others do the manual labor as directed by Petitioner. This is not the mere reaping of income from capital but **business** as we know it today. Petitioner's profit or loss is solely dependent upon the success or failure of the farm operations directed and controlled by him and this is one of the controlling elements considered by the courts in the bankruptcy cases hereinbefore cited.

It is true that the mere reaping of income from capital does not constitute engaging in business. This question has been passed upon many times by the Federal Courts. In the case of **Washburn v. Commissioner of Internal Revenue**, 51 Fed. (2d) 949, the court had occasion to distinguish between an investor living upon the returns of his property and one engaged in business.

In that case, Washburn was a retired lawyer. While practicing law he had organized a number of corporations and enterprises and he retired from the active practice of law to manage these various enterprises. Under a tax statute it was insisted that he was not engaged in business but that his occupation was guarding his various investments in order to reap the harvest therefrom. The court held, however, that he was engaged in business. The court said (l. c. 953):

> "Much is said in argument as to petitioner being engaged solely in holding the securities of the enterprises in which he was interested, and that he was a mere investor receiving the ordinary returns of ownership. A party may have investments in corporate stock, have no particular occupation, and live on the return of his investments. That would not constitute business under the statute in question. He may, however, take such an active part in the management of the enterprise in which he has investments as to amount to the carrying on of a business. * * * We think the line here is not difficult to draw. The business of petitioner was not merely looking after investments or reaping the return of past labor represented thereby. He had an office with a complete organization, and gave personal attention to, and participated in, the management of these various companies and enterprises in which he had the investments, not for the purpose of conserving them merely, but of carrying them on successfully and making them profitable. To this he gave his entire time, receiving no salary, except such as might cover his expenses. His work for these different enterprises was not merely sporadic, but was a continuous and regular carrying on. Petitioner testifies he worked as hard at his new line of work as he did when he was practicing law. His income was the result, not alone of his investments, but also of his labor expended in connection with the management of the companies in which he had such in-

vestments. The combination of the two is his vocation."

In the case of **Foss v. Commissioner of Internal Revenue,** 75 Fed. (2d) 326, the court again considered a like situation and held that a person of property who devotes his time to the active management of it, is carrying on a business. The court said (l. c. 328):

> "If Foss had employed somebody else to look after his affairs, that person would certainly have been engaged in business; and we think that Foss, in attending to his affairs himself, was equally engaged in business. The line comes between those who take the position of passive investors, doing only what is necessary from an investment point of view, and those who associate themselves actively in the enterprises in which they are financially interested and devote a substantial part of their time to that work as a matter of business."

So in this case Petitioner's livelihood was a result, not of his capital, but of his labor expended in connection with the management of a rented farm and the purchase and sale of live stock. It is the combination of these two which constitutes his business, and it is from this business that he is, under his own testimony, making his livelihood. Petitioner has not been compelled to give up the business of farming. As said in the **Foss Case,** if Petitioner had employed somebody else to look after his farms and live stock business and do what he is now doing with reference thereto, that party would certainly be engaged in business. Petitioner is none the less engaged in business because he is performing the services for himself and his landlord. He has merely changed his method of operating that business in an unsubstantial detail.

It is apparent that the trial court's error in this matter led to his erroneous ruling upon the case. If he had con-

sidered Petitioner's business as a combination of his personal efforts and the rental of a farm, which under all authorities and definitions of the word must be considered, then under the testimony in this record it must be found that Petitioner is engaged in business for remuneration and profit within the provisions of the policy.

4. The Petitioner under his own evidence is able to perform all the duties of his business as now conducted by him.

The Petitioner himself testified that, during the time here in question, he was operating the farms as a grain and stock farm, buying and selling stock and feeding to them the feed raised on the farms (Tr. 31-34). Since his injury the necessity for some of the manual labor in the operations of the farms has been removed by the purchase of modern machinery (Tr. 32). He detailed the duties that he now performs in the operation of these farms (Tr. 31-46). He testified that he was able to perform all these duties.

Petitioner, having himself testified that he is able to perform the duties of the business he is now engaged in, is bound thereby. **Behen v. St. Louis Transit Co.**, 186 Mo. 430, l. c. 440-441, 85 S. W. 346; **McCoy v. Home Oil and Gas Co.** (Mo. App.), 60 S. W. (2d) 715, l. c. 724; **Paetz v. London Guarantee and Accident Co., Ltd.** (Mo. App.), 71 S. W. (2d) 826, l. c. 828.

In the latter case the Court said:

> "If there is any substantial evidence to support the verdict even though meager and contradicted by defendant's evidence, we cannot disturb the verdict. * * * **Of course, this is on the theory that there is no evidence of plaintiff which, unexplained, flatly contradicts his cause of action. In such situation a plain-**

tiff himself destroys his own case, but that is not the situation here." (Emphasis ours.)

VII.

It is established that the amount in controversy exceeds $3,000.00.

The petition on its face discloses that the amount involved in this suit is $3,165.70, which sum is composed of $2,375.00 disability benefit payments and $790.70 premiums which would be waived if petitioner is entitled to disability benefits (Tr. 7).

The answer of Petitioner admitted that there was due him under the provisions of the policy $2,375.00 for monthly payments, admitted that he had paid premiums falling due on said policies in the amount of $790.70, but denied that he had ever claimed a refund of the premiums or was demanding the same (Tr. 14). However, on the trial of the case it was admitted by Petitioner's counsel that the amount of disability benefits involved in the case was $2,375.00 and that the amount of premiums which Defendant had paid was $790.70 (Tr. 24). At the time of making this admission Petitioner made no waiver of any right to his return of premium.

If he was totally disabled and entitled to the disability payments, then, under the provisions of this policy, he was entitled to the return of his premiums during the term of disability. **Lydon v. New York Life Insurance Company,** 89 Fed. (2d) 78 (C. C. A. 8th).

In that case the Circuit Court of Appeals held upon identical policy provisions that premiums must be refunded by the insurer if total disability is established, even though paid without protest by the insured and no demand for the return was made by him but the demand was made by his executor after the insured's death.

The trial court followed the Lydon case and entered its

declaratory judgment that the respondent insurance company was liable to petitioner "for total and permanent disability benefits (including waiver of premiums) for the period beginning May 29, 1936, to January 7, 1938" (Judgment, Tr. 100). The declaratory judgment, therefore, entered by the trial court was for $3,165.70. (Emphasis ours.)

Petitioner recognizes the fact that the judgment was for $3,165.70 in his brief and argument filed with the petition for writ of certiorari when he said, under Point II thereof, page 13, "This action seeks only the determination of a legal right, i. e., whether the respondent is indebted to petitioner in the sum of $3,165.70."

It therefore appears from the face of the record that this judgment entered below and from which the appeal was taken was for $3,165.70, and the jurisdiction of this Court, therefore, is beyond question.

CONCLUSION.

In conclusion, the Respondent submits that the judgment of the Circuit Court of Appeals for the Eighth Circuit is for the right party; is in harmony with the decisions of all of the Missouri Courts of Appeals; is in harmony with the decisions of the Supreme Court of Missouri, and reaches the result which would have been reached by the State Courts upon the facts which are specifically found to exist.

Respectfully submitted,

BOYLE G. CLARK,
PAUL M. PETERSON,
WILLIAM H. BECKER,
Columbia, Missouri,
Attorneys for Respondent.

LOUIS H. COOKE,
New York City,
Of Counsel.

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 17 1941
CHARLES ELMORE CROPLEY
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 74.

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

MOTION FOR REHEARING AND SUGGESTIONS IN SUPPORT THEREOF.

BOYLE G. CLARK,
PAUL M. PETERSON,
WILLIAM H. BECKER,
Columbia, Missouri,
Attorneys for Respondent.

LOUIS H. COOKE,
New York City,
Of Counsel.

Blank Page

INDEX

Motion for Rehearing 1-2

Suggestions in Support of Motion for Rehearing—

1. This court erroneously held that the district court applied the rule announced by the intermediate state appellate court, the Kansas City Court of Appeals. An application of the rule announced by the Kansas City Court of Appeals to the facts as specifically found by the district court requires a finding against total disability 3

2. The court overlooked and failed to pass upon the contention of the respondent that a conflict existed between the intermediate state courts of Missouri 5

TABLE OF CASES

Eden vs. Metropolitan Life Insurance Company, 138 S. W. 2d 745 6

Jones vs. Metropolitan Life Insurance Company, 130 S. W. 2d 967 5

Smith vs. Metropolitan Life Insurance Company, 108 S. W. 2d 995 6

Stoner vs. New York Life Insurance Company, 232 Mo. App. 1048, 114 S. W. 2d 167 ..... 3, 4

Blank Page

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 74.

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

MOTION FOR REHEARING.

Comes now the respondent, New York Life Insurance Company, a corporation, and moves the court to grant it a rehearing in this cause for the following reasons:

1. This court erroneously held that the district court applied the rule announced by the intermediate state appellate court, the Kansas City Court of Appeals. An application of the rule announced by the Kansas City Court of Appeals to the facts as specifically found by the district court requires a finding against total disability.

2. The court overlooked and failed to pass upon the contention of the respondent that a conflict existed between the intermediate state courts of Missouri.

Respectfully submitted,

BOYLE G. CLARK,
PAUL M. PETERSON,
WILLIAM H. BECKER,
Columbia, Missouri,
Attorneys for Respondent.

LOUIS H. COOKE,
New York City,
Of Counsel.

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING.

1.

This court erroneously held that the district court applied the rule announced by the intermediate state appellate court, the Kansas City Court of Appeals. An application of the rule announced by the Kansas City Court of Appeals to the facts as specifically found by the district court requires a finding against total disability.

In its opinion in the case at bar this court assumed that the district court recognized and applied the law with respect to total disability as declared by the intermediate state appellate court. It so states in the opinion as a basis for the affirmance of the judgment of the district court. Respondent respectfully submits that the conclusion of law announced by the district court (Tr. 99) is not in accordance with the rule announced and applied by the Kansas City Court of Appeals (232 Mo. App. 1048, 114 S. W. 2d 167).

Under the provisions of the Federal Rules of Procedure the district judge trying the case without a jury made specific findings of fact and announced its conclusion of law. Its memorandum opinion sets forth the facts specifically found therein. The court then set forth its conclusion of law which it applied to the facts found and arrived at the ultimate "Finding of Fact" of total disability (Tr. 100). This last so-called finding of fact resulted directly from the conclusion of law applied. If this conclusion of law is erroneous in light of the rule of the intermediate state court the judgment of the district court should not be affirmed. We submit that it is erroneous.

The conclusion of law announced by the district court is as follows:

> "To have a declaratory judgment that it is not liable on account of total and presumably permanent disability under (fol. 102) a policy of insurance such as is involved in this case an insurance company must prove by the preponderance or greater weight of the credible testimony that the insured can do any work; or that he can follow any occupation, that is, any of those occupations by which men earn livelihoods for themselves and their families, himself performing such of its duties as substantially constitute that occupation; or that he can engage in any business for remuneration or profit, that is, in any of those businesses by which men earn livelihoods for themselves and their families, himself performing such of its duties as substantially constitute that business."

This conclusion of law placed upon the respondent an insurmountable burden. Under the facts of this case the respondent could never have secured a favorable finding. Nevertheless, the Kansas City Court of Appeals had held that the evidence would support a finding in favor of the respondent. In its opinion from the last appeal the Kansas City Court of Appeals summarized its rule as follows:

> (*Stoner* v. *New York Life Insurance Company*, 232 Mo. App. 1048, 114 S. W. 2d 167:) "We further held, 90 S. W. 2d 784, l. c. 797, that the conceded inability of plaintiff to perform labor, which was part of his substantial duties, would not justify, as a matter of law, a verdict for the plaintiff; that plaintiff would not be entitled to recover, notwithstanding he could not perform farm labor by reason of his injuries, if he nevertheless had the ability to substantially perform his occupation by discharging duties, other than farm labor."

The opinion of the district court and of this court fails to give effect to this phase of the rule of the state intermediate appellate court.

The adoption by the district court of an erroneous conclusion of law vitiated the judgment rendered by the district court.

The petitioner's injuries consisted simply of a stiffened ankle which prevented him from performing that part of the farm labor which required the continuous use of both feet. He was otherwise healthy and able. He did engage in farming as a business for remuneration and profit and earned a livelihood and a profit in addition. It is settled that this court should require application of the proper state law in cases of this character. But its duty does not end with correcting the opinion of the circuit court of appeals. It should follow through and see that the district court properly applies the law. In this case the job has been only half done.

2.

The court overlooked and failed to pass upon the contention of the respondent that a conflict existed between the intermediate state courts of Missouri.

In its brief the respondent submitted to this court the contention that the rule announced by the St. Louis Court of Appeals and the Springfield Court of Appeals supported the conclusion of the circuit court of appeals and was in conflict with the petitioner's construction of the opinion of the Kansas City Court of Appeals (Respondent's Brief pages 23 to 30). This court inadvertently overlooked this contention and failed to mention or pass upon it in its opinion. The important questions of the existence and of the effect of conflict in state intermediate courts of appeal of less than statewide jurisdiction is vital and should be passed upon.

The opinion of the Springfield Court of Appeals of Missouri in conflict with the Kansas City Court of Appeals opinion is that of *Jones* v. *Metropolitan Life Insurance Company*, 130 S. W. 2d 967. The opinions of the St. Louis Court of Appeals in conflict with the Kan-

sas City Court of Appeals are those of *Smith* v. *Metropolitan Life Insurance Company*, 108 S. W. 2d 995, and *Eden* v. *Metropolitan Life Insurance Company*, 138 S. W. 2d 745.

The Eden case is cited in support of this court's conclusion in affirming the district court. The Eden case is in conflict with the judgment of the district court and supports the judgment of the opinion of the circuit court of appeals.

In any event respondent is entitled to have this decisive contention examined and passed upon by this court. Because it was overlooked a rehearing should be granted.

Respectfully submitted,

BOYLE G. CLARK,
PAUL M. PETERSON,
WILLIAM H. BECKER,
Columbia, Missouri,
Attorneys for Respondent.

LOUIS H. COOKE,
New York City,
Of Counsel.

Blank Page

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 25 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 74.

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

SUGGESTIONS IN OPPOSITION TO RESPONDENT'S MOTION FOR A REHEARING.

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With Him on the Brief:
R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

Blank Page

Table of Cases

Eden vs. Metropolitan Life Insurance Co., 138 S. W. 2d 745 3

Heald vs. Metropolitan Life Insurance Co., 99 S. W. 2d 979 3

James vs. Casualty Co., 113 Mo. App. 622 3

Jones vs. Metropolitan Life Insurance Co., 130 S. W. 2d 967 3

Smith vs. Metropolitan Life Insurance Co., 108 S. W. 2d 995 3

Blank Page

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 74.

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY, RESPONDENT.

SUGGESTIONS IN OPPOSITION TO RESPONDENT'S MOTION FOR A REHEARING.

The motion for rehearing is obviously without merit and it may be for that reason counsel did not see fit to support it by "a certificate of counsel to the effect that it is presented in good faith and not for delay" as required by Rule 33 of this court. The copy served upon us shows no such certificate.

It is suggested that (a) the district court based its finding of total disability on a conclusion of law which is contrary to the rule announced in the two *Stoner* cases, and (b) there is a conflict between the decisions of the Missouri courts of appeal.

(a) The conclusion of law is in accordance with the rule announced in the *Stoner* cases.

The trial court announced the rule to be that, to show that insured was not totally disabled, respondent

had to prove he was able to engage in a business or occupation for remuneration or profit and to perform "such of his duties as substantially constitute that business."

Throughout the litigation it has been petitioner's theory that in doing the manual labor required to cultivate and operate his farm and in performing his managerial duties, he was engaged in *one* occupation, the occupation of a farmer, and was totally disabled if he could not perform the substantial duties of that occupation (assuming, as was conceded, there was no other business or occupation in which he could engage). It was respondent's theory that, aside from his manual labor as a farmer—which it was admitted he could not perform—"he had engaged in the occupation of farm manager, operator and supervisor and in buying and trading in farm commodities and that the plaintiff had been able to earn a livelihood, and more, in pursuance of these duties."

In both *Stoner* cases the Kansas City Court of Appeals denied respondent's contention and held that petitioner was engaged in *one* occupation and the question to be submitted to the jury was "whether he could have substantially performed that occupation." The court said, in the second *Stoner* case:

> "This court in the appeal in the other case held that it was improper, in instructing the jury, for the defendant to have separated plaintiff's duties so as to make his occupation twofold instead of single, that is, to proceed on the theory that he was engaged in the occupation of farm owner, operator and manager and, also the occupation of farmer engaged in actual farming operations on the farms, which included farm labor, itself. It was held that the evidence shows that plaintiff was engaged in but *one* occupation that included both the management and operation of the farms and his own labor in the actual farming operations; *that the instructions should have viewed plaintiff's occupation as a whole and submitted whether he could have substantially performed that occupation*" (italics ours).

In *Heald* v. *Metropolitan Life Insurance Co.*, 99 S. W. 2d 979, the court said:

> "It was not error for the court to instruct the jury on behalf of the plaintiff, that they might render a verdict for him if they found that his injuries 'prevented him from performing, substantially, his occupation.' "

On certification to the Supreme Court that court followed *James* v. *Casualty Co.*, 113 Mo. App., l. c. 622, saying:

> "The conclusion in the *James Case, supra,* was 'that the disability meant is a disability as to the performance of any substantial part of the business. * * * We therefore hold the contract to mean, not that the assured was rendered absolutely and literally unable to perform any part of his occupation, but that he was disabled from performing substantially the occupation stated in the policy."

Justice Murphy was therefore right in saying that the district judge in the present case used the same test of disability employed in the two *Stoner* cases and in the other cases cited in the opinion.

(b) There is no conflict whatever between the decisions of the Kansas City Court of Appeals in the *Stoner* cases and the decision of the Springfield and St. Louis courts of appeal in *Jones* v. *Metropolitan Life Insurance Co.*, 130 S. W. 2d 967, *Smith* v. *Metropolitan Life Insurance Co.*, 108 S. W. 2d 995, and *Eden* v. *Metropolitan Life Insurance Co.*, 138 S. W. 2d 745.

As a matter of fact, all of those cases announce the identical rule of law. In all of the cases the question was presented whether the evidence was sufficient to sustain a finding of total disability. In the three cases cited by respondent the court ruled that a demurrer should have been sustained, but upon facts entirely different from those in the case at bar. In each one of

those cases the evidence on behalf of the plaintiff showed conclusively that the insured performed all of his duties during the entire period of claimed disability and earned full wages. In one of them the evidence tended to show that the plaintiff was totally disabled *temporarily* and he was denied a recovery because the policy required that the disability be permanent.

Conclusion.

May we be permitted to go outside of the record to make this observation: To ascertain but one thing, *i. e.*, whether he is totally disabled, about which the facts are undisputed, petitioner has been in three state circuit courts; in the state court of appeals twice; in the state Supreme Court on certiorari; in the United States District Court once on respondent's petition for removal and back again; in the United States District Court, as defendant in a bill brought by respondent to enjoin the prosecution of his actions; in the United States Circuit Court of Appeals on an appeal from the decree in that case; in the United States District Court, the circuit court of appeals and in this court in this action for a declaratory judgment. Petitioner is a farmer and, from his viewpoint, he may have been justified when he observed "This law business is quite a farce, isn't it?"

We submit the motion for rehearing should be overruled and the litigation thereby ended.

Respectfully submitted,

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With Him on the Brief:
R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

Blank Page

Blank Page

SUPREME COURT OF THE UNITED STATES.

No. 74.—October Term, 1940.

Lewis K. Stoner, Petitioner,
vs.
New York Life Insurance Co., Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 23, 1940.]

Mr. Justice Murphy delivered the opinion of the Court.

Respondent insurance company brought this suit in the federal district court for a declaratory judgment that it was no longer obligated to make disability payments to petitioner or to waive payment of premiums under the total disability clauses of insurance policies issued to petitioner prior to 1931. The question is whether the Circuit Court of Appeals should have followed two decisions of the Kansas City Court of Appeals in earlier suits between the same parties.

In June, 1931, petitioner fell and seriously injured his left ankle. The injury is permanent. For about two years after the injury, respondent paid petitioner the total disability benefits and waived premiums. In October, 1933, it notified him that it intended to cease benefit payments and waiver of premiums because it no longer considered him totally disabled.

In April, 1934, petitioner brought suit in a Missouri state court for the disability payments allegedly due and unpaid at that time. From a verdict and judgment for respondent he appealed to the Kansas City Court of Appeals, an intermediate state appellate court. That court held that petitioner's evidence was sufficient to take the case to the jury and that the trial judge erred in giving certain instructions. It reversed and remanded the case for a new trial. 90 S. W. (2d) 784. Respondent thereupon sought a writ of certiorari from the Missouri Supreme Court but was unsuccessful. In consequence, the action is still pending but has not yet been retried.

In June, 1936, after remand of the first case, petitioner instituted two more actions, also in Missouri state courts, to recover disability benefits which allegedly had accrued since commencement of the first suit. One action was tried and this time petitioner secured verdict and judgment from which respondent appealed. The Kansas City Court of Appeals again reversed because of error in the instructions, although it held that petitioner's evidence presented a case for the jury. It remanded the action for a new trial. 114 S. W. (2d) 167. Both of these actions also are pending trial.

At this juncture respondent, a New York corporation, started the present suit against petitioner, a resident of Missouri, in the District Court for the Western District of Missouri. It sought a declaratory judgment that petitioner was not totally disabled within the meaning of the disability clause, and hence, that respondent was not liable for disability payments or waiver of premiums from June, 1936, until the date of suit. To prove its case respondent introduced the transcript of testimony taken in the second of the earlier suits. Petitioner supplemented the transcript by a statement of respondent against interest, a personal deposition, and the testimony of another doctor. The trial, without a jury, resulted in a judgment for petitioner, the district judge finding that petitioner was totally disabled within the meaning of the policies. The Circuit Court of Appeals reversed, however, holding that the evidence established that petitioner was not totally disabled. It remanded with directions to enter a declaratory judgment as prayed by respondent. 109 F. (2d) 874. We granted certiorari on October 14, 1940.

We are of opinion that the Circuit Court of Appeals erred in failing to follow the two decisions of the Kansas City Court of Appeals in earlier suits between the same parties involving the same issues of law and fact.

We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently. *West* v. *American Telephone & Telegraph Co.*, Nos. 44, 45; *Fidelity Union Trust Co., et al.* v. *Field*, No. 32; *Six Companies of California et al.*

v. *Joint Highway District*, No. 267. In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review. *West* v. *American Telephone & Telegraph Co., supra.*

Twice the Kansas City Court of Appeals has had before it appeals involving the same parties, insurance contracts, and facts as are involved here. *Stoner* v. *New York Life Ins. Co.*, 90 S. W. (2d) 784; *Stoner* v. *New York Life Ins. Co.*, 114 S. W. (2d) 167. Each time respondent argued that petitioner's evidence failed to present a submissible case. 90 S. W. (2d) 784, 790; 114 S. W. (2d) 167, 168. Each time the Kansas City Court of Appeals expressly stated that the evidence as to total disability presented a question for the jury. 90 S. W. (2d) 784, 794, 797; 114 S. W. (2d) 167, 169. Moreover, in approving or disapproving certain instructions it marked out the limits of the test the jury was to employ in determining the existence or non-existence of total disability within the meaning of the policies.

It is apparent, then, that the question of total disability, on the evidence before the court in those two cases, is a question for the jury under instructions embodying the test the Kansas City Court of Appeals approved. Under the rule of the *West, Six Companies,* and *Field* cases, *supra,* it was error for the Circuit Court of Appeals to hold, in effect, that the evidence would not support the finding of the trial judge that there was total disability, unless convincing evidence indicated that the Missouri Supreme Court would decide differently.

The present case is not different merely because there are now in the record a statement against interest, a deposition of petitioner, and the testimony of a doctor which were not in the record in the earlier cases. The three items of evidence were introduced by petitioner and, if anything, weaken respondent's case. Moreover, apart from these three items, the evidence in the present case consists of the transcript the Kansas City Court of Appeals had before it when it wrote the opinion in the second appeal (114 S. W. (2d) 167).

Nor is there any indication that either the Kansas City Court of Appeals or the Missouri Supreme Court would decide this case differently. Certainly there is nothing to suggest that the Kansas

City Court of Appeals now would conclude that the evidence is insufficient after it has held that the same evidence presented a question for the jury. And while the concept of total disability is inseparable from the facts to which it is applied, *Heald* v. *Aetna Life Insurance Co.*, 340 Mo. 1143, 104 S. W. (2d) 379, indicates that the Missouri Supreme Court likewise would conclude that a finding of total disability here is supported by the evidence. See also *Foglesong* v. *Modern Brotherhood*, 121 Mo. App. 548; *James* v. *U. S. Casualty Co.*, 113 Mo. App. 622; *Bellows* v. *Travelers' Insurance Co.*, 203 S. W. 978, which were approved in the *Heald* case.

Furthermore, the test for determining total disability approved in the *Heald* case was employed in the first and followed in the second of the appeals to which we have referred. 90 S. W. (2d) 784, 793, 795; 114 S. W. (2d) 167, 171, 172. It has been employed consistently since the *Heald* case was decided. *Eden* v. *Metropolitan Life Ins. Co.*, 138 S. W. (2d) 745; *Comfort* v. *Travelers' Insurance Co.*, 131 S. W. (2d) 734; *Rogers* v. *Metropolitan Life Ins. Co.*, 122 S. W. (2d) 5; *Wright* v. *Metropolitan Life Ins. Co.*, 115 S. W. (2d) 102. The same test was used by the district judge in the present suit. He applied it to the evidence which the Kansas City Court of Appeals twice has said presented a question for the jury; and, since the case was tried to the court, he determined that the evidence established total disability. We think it is immaterial that in the earlier suits the burden was on petitioner to prove total disability while here the courts below assumed the burden is on respondent to show that total disability no longer exists.

We conclude that it was error to direct the entry of a declaratory judgment for respondent. It was proper, however, to deny petitioner's motion to dismiss for want of the necessary amount in controversy since a judgment in favor of respondent would determine petitioner's claim to both benefit payments and waiver of premiums. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.